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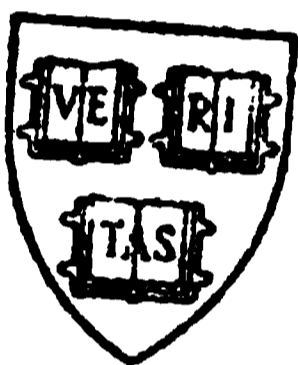
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

By JOHN W. KERN,
OFFICIAL REPORTER.

VOL. 115,
CONTAINING CASES DECIDED AT THE MAY TERM, 1888.

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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. WILLIAM E. NIBLACK. * †
HON. GEORGE V. HOWK. †
HON. BYRON K. ELLIOTT. ‡
HON. ALLEN ZOLLARS. †
HON. JOSEPH A. S. MITCHELL. §

*** Chief Justice at the May Term, 1888.**

† Term of office commenced January 1st, 1883.

‡ Term of office commenced January 3d, 1887.

§ Term of office commenced January 6th, 1885.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
WILLIAM T. NOBLE.

SHERIFF,
MYRON NORTH.

LIBRARIAN,
CHARLES E. COX.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1888, IN THE SEVENTY-
SECOND YEAR OF THE STATE.

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No. 13,231.

BRAVARD v. THE CINCINNATI, HAMILTON AND INDIANAPOLIS RAILROAD COMPANY.

STATUTE.—*Publication and Distribution "by Authority."*—*Railroad Law of 1852.*—The publication and circulation by the secretary of state of the railroad law of 1852, under a resolution passed by the General Assembly, in advance of the publication of the revised statutes of that year, constituted a publication and circulation of such law "by authority," within the meaning of the Constitution.

RAILROAD.—*Act of 1852.*—*Grant of Right of Way in Advance of Organization.*—*Ratification.*—Under section 13 of the railroad law of 1852 (1 G. & H. 508), construed in connection with other powers of a railroad company, it was competent for a land-owner to grant a right of way over his land to a railroad company in advance and in aid of its organization, and for the company, after its organization, to ratify and accept the grant by entering upon and using the land for the purposes of its road, and thus make such grant obligatory.

SAME.—*Failure to Complete Road Within Time Limited.*—*Forfeiture of Franchise.*—*Ejectment.*—The failure of a railroad company to construct its road within the time limited by statute may afford cause for enforcing, by proper proceedings, a forfeiture of its corporate powers, but it is not available to a land-owner in an action to eject the company from his land after the road has been constructed thereon.

Bravard v. The Cincinnati, Hamilton and Indianapolis Railroad Co.

SAME.—*Trespassing Railroad.*—*Estoppel.*—*Ejectment.*—*Injunction.*—*Assessment of Damages.*—A trespassing railroad company may be ejected from land, or enjoined from appropriating or using it, if the owner shall proceed with reasonable promptitude; but if he acquiesces until the road has been constructed across his land and has become a part of the railroad line, in which the public has acquired an interest, his only remedy is through a proceeding for the assessment of damages.

From the Rush Circuit Court.

B. L. Smith, W. J. Henley, C. Gambern and T. J. Newkirk,
for appellant.

R. D. Marshall, for appellee.

NIBLACK, C. J.—This was in form an ordinary action by Benjamin D. Bravard against the Cincinnati, Hamilton and Indianapolis Railroad Company to recover the possession of a strip of ground appropriated and used by the company as a part of its right of way and line of road.

The circuit court tried the cause without a jury, and the finding and judgment were for the defendant.

It was shown by the evidence that the plaintiff below, and the appellant here, was the owner by devise from his father, Lewis Bravard, of the tract of land of which the strip in controversy constitutes a part; that the said Lewis Bravard was, on the 2d day of February, 1853, the owner in fee of that tract of land, and that he, on that day, executed to the Ohio and Indianapolis Railroad Company a release of the right of way over that land; that the Ohio and Indianapolis Railroad Company did not organize until the 4th day of February, 1853, two days after the right of way was granted as above; that, on the 20th day of April, 1853, the Ohio and Indianapolis Railroad Company and the Junction Railroad Company were, by articles of agreement, consolidated under the name of the latter company; that the Junction Railroad Company, as thus reorganized, was, in November, 1872, purchased by the appellee, the Cincinnati, Hamilton and Indianapolis Railroad Company, at a master's sale under a decree of foreclosure, rendered by the circuit court of

Bravard v. The Cincinnati, Hamilton and Indianapolis Railroad Co.

the United States for the District of Indiana, by means of which the appellee succeeded to all the rights and liabilities of the Junction Railroad Company; that before the consolidation took place, the Ohio and Indianapolis Railroad Company made a preliminary survey of a proposed line of road over the tract of land now belonging to the appellant, as stated, and that, after the consolidation, the Junction Railroad Company continued the preliminary survey and located its line of road over and upon the strip of land in question; that no work was done on the appellant's land until the summer of 1867, when the line of road, as it now runs and is operated, was constructed; that Lewis Bravard owned and lived upon the tract of land, since acquired by the appellant, at the time the line of road was so constructed, and did not object to the road being built over the land; that the amount of land taken and appropriated in the first instance, and now used by the appellee, is two acres and eighty-nine hundredths of an acre.

The appellant bases his right to recover in this action upon the grounds:

First. That, on the 4th day of February, 1853, there was no general law in force in this State authorizing the incorporation of railroad companies.

Secondly. That, as the grant of the right of way was executed by Lewis Bravard before the Ohio and Indianapolis Railroad Company was assumed to be organized, it was at all events inoperative and void.

Thirdly. That, as the Junction Railroad Company did not construct its line of road within the time limited by the railroad law of 1852, it forfeited all right which it may have first acquired to construct such line of road, and became a mere trespasser upon the lands which it thereafter proceeded to further appropriate and to use in building its road.

Fourthly. That, as no compensation was ever assessed and paid for the strip of land in dispute, he has a right to reclaim and to recover the possession of that strip, notwithstanding

Bravard v. The Cincinnati, Hamilton and Indianapolis Railroad Co.

his and his ancestor's long acquiescence in its use by the appellee.

On the 9th day of June, 1852, a joint resolution of the General Assembly of this State was approved, which authorized the secretary of state to publish and circulate the general railroad law of that year, and certain other acts of the same Legislature, in pamphlet form, in advance of the publication and distribution of the general system of laws thereafter known as the Revised Statutes of 1852. This was accordingly done, and constituted a publication and circulation of the general railroad law, and other laws specially named in the joint resolution, "by authority," within the meaning of the present Constitution of the State, by means of which these laws came into force some months previous to the 4th day of February, 1853.

A railroad company, or any other similar corporation, organized under a general law, has undoubtedly the power to ratify and confirm any preliminary thing which may have been properly done in aid of, or which may have been offered as an inducement to, its organization. This extends to the payment of preliminary expenses which may have been incurred, to the subscription of stock, and other kindred matters. The 13th section of the act of 1852 authorizing the incorporation of railroad companies (1 G. & H. 508), conferred upon a railroad company the power "To receive, hold, and take, such voluntary grants and donations of real estate and other personal property as shall be made to it, to aid in the construction, maintenance, and accommodation of such railroad."

This necessarily included the right of way over, as well as any other appropriate interest in, real estate. Construing this provision of the statute in connection with other and conceded powers of a railroad company, we think it was competent for Lewis Bravard to grant the right of way over his land to the Ohio and Indianapolis Railroad Company in advance, and in aid of its organization, and for that company,

Bravard v. The Cincinnati, Hamilton and Indianapolis Railroad Co.

after its organization, to ratify and accept the grant, and thus make it obligatory upon him.

This grant by Lewis Bravard seems to have been made to the Ohio and Indianapolis Railroad Company by its corporate name, from which we infer that it was executed in anticipation of, and as an inducement to, its organization, which speedily thereafter ensued. The subsequent entry upon the land, and location of a line of road over it, were, under the circumstances, an implied ratification and acceptance of the grant, and made it effectual as a relinquishment of the right of way to the company.

The failure of a railroad company to construct its road within the time limited by the statute may afford good cause for enforcing a forfeiture of its corporate powers by proper legal proceedings instituted for that purpose, but such a failure can not be taken advantage of by a land-owner, over whose land the road may have been eventually constructed, to eject the company from his land. *Cincinnati, etc., R. R. Co. v. Clifford*, 113 Ind. 460.

In addition to what we have said, it may be stated that the accepted doctrine now is, that, where a railroad company enters upon the land of another, without the consent of the owner, and not by the exercise of the right of eminent domain, it may be ejected from the land, or enjoined from appropriating or using it, if the owner shall proceed with reasonable promptitude; but that if the owner stands by, and acquiesces, until the company has expended its money and constructed its road across his land, and until the road at that point has become a part of its railroad line, whereby the public, as well as the company, has acquired an interest in the maintenance of the enterprise, he forfeits every remedy except that of proceeding to have his damages assessed and collected from the company. *Midland R. W. Co. v. Smith*, 113 Ind. 233; *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 581; *Evansville, etc., R. R. Co. v. Nye*, 113 Ind. 223.

In any view of the evidence which we feel justified in

The State, *ex rel.* Maggard, *v.* Caldwell *et al.*

taking, the court below did not err in its finding and judgment in favor of the appellee.

The judgment is affirmed, with costs.

Filed May 28, 1888. ,

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No. 13,273.

THE STATE, EX REL. MAGGARD, *v.* CALDWELL ET AL.

BASTARDY.—*Judgment.*—*Escape of Defendant from Constable.*—*Subsequent Arrest.*—*Action Upon Officer's Bond.*—*Mitigation of Damages.*—A judgment against a bastardy defendant, who is not in custody, that he shall be committed to jail until the judgment in favor of the relatrix be paid or replevied, is authorized by section 986, R. S. 1881, and the fact that the defendant is subsequently arrested and committed to jail in pursuance of the judgment may be pleaded in mitigation of damages in an action by the relatrix upon the bond of a constable for allowing the defendant to escape from his custody, thus limiting the plaintiff's recovery to the damages actually sustained by reason of the escape.

SAME.—*Warrant.*—*Officer's Return.*—*Parol Contradiction.*—*Evidence.*—Where, in the action on the bond, the constable testifies, without objection from the plaintiff, to a state of facts showing that he had never arrested the bastardy defendant, it is not error to permit him to testify, in explanation of the apparent contradiction between his testimony and his return on the warrant, that his return showing the arrest and escape of the defendant was made in that manner at the request of the relatrix's attorney.

INSTRUCTION TO JURY.—*Reversal of Judgment.*—*Supreme Court.*—Where the merits of a cause have been fully and fairly tried, and a right conclusion has been reached, an erroneous instruction will not authorize the reversal of the judgment.

From the Scott Circuit Court.

W. K. Marshall, for appellant.

C. L. Jewett and *H. E. Jewett*, for appellees.

The State, *ex rel.* Maggard, v. Caldwell *et al.*

HOWK, J.—This was a suit by plaintiff's relatrix, Alice Maggard, against the defendants, upon the official bond of defendant Caldwell, as constable of Vienna township, in Scott county, Indiana, to recover damages for an alleged breach of his official duty.

In her complaint relatrix first alleged that at the April election, 1884, defendant Caldwell was duly elected a constable of said Vienna township for the term of two years thence next ensuing; that he and his co-defendants executed and acknowledged his official bond, now in suit, conditioned for the faithful and honest discharge of his official duties as such constable; and that he took and subscribed the official oath required by law, and entered upon the discharge of his official duties. As a breach of the condition of the bond in suit, relatrix averred that, in 1884, she filed her verified complaint before a justice of the peace of such township, charging therein that one Austin Wiggam was the father of her bastard child, of which she had been delivered; that thereupon a warrant was issued by such justice for the arrest of said Wiggam, and placed in the hands of defendant Caldwell, as such constable, in 1884; that, by virtue of such warrant, defendant Caldwell, as such constable, on the same day, arrested said Wiggam and had him in his custody under such warrant; but that, soon after such arrest and on the same day, defendant Caldwell, as such constable, "negligently, wilfully and carelessly" suffered said Wiggam to escape from his custody; that such defendant Caldwell thereupon returned said warrant to such justice, showing thereby the arrest and escape of said Wiggam; that afterwards such justice proceeded with the trial of such suit in bastardy, and found and adjudged that said Austin Wiggam was the father of the bastard child of the relatrix herein; that such justice transmitted the papers in said bastardy suit without delay to the court below, where the cause was docketed, and, in the absence of said Wiggam, was tried and determined by the court, and relatrix herein recovered judgment in such suit

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for the sum of \$400 for the support of her bastard child, and the costs of suit taxed, etc., at the March term, 1885, of such court; that such judgment remained wholly unpaid; and that, by reason of the negligence and malfeasance of defendant Caldwell in suffering said Wiggam to escape as aforesaid, said judgment was wholly lost and uncollectible. Wherefore, etc.

Defendants Caldwell, Davis and Dismore, severing in their defence, jointly answered (1) by a general denial of the complaint, and (2) by a partial answer in mitigation of damages.

Defendants Cruson and Sierp, also severing in their defence, jointly answered in three paragraphs, of which the first was a general denial of the complaint, and the second and third paragraphs each stated special or affirmative matters by way of defence. Replies were filed by relatrix, putting the cause at issue. The issues joined were tried by a jury, and a verdict was returned for the defendants, and, over the motion of plaintiff's relatrix for a new trial, the court adjudged that she take nothing by her suit herein, and that defendants recover of her their costs taxed, etc.

In this court errors are assigned by plaintiff's relatrix which call in question (1) the overruling of her demurrer to the second paragraph of the joint answer of defendants Caldwell, Davis and Dismore, (2) the overruling of her demurrer to the third paragraph of the joint answer of defendants Cruson and Sierp, and (3) the overruling of her motion for a new trial herein.

We will consider these alleged errors in the order of their statement, and decide the questions thereby presented.

In the second paragraph of their joint answer, defendants Caldwell, Davis and Dismore, for a partial answer in mitigation of damages, alleged that after the arrest and escape of said Austin Wiggam, as stated in the complaint herein, the relatrix prosecuted her suit in bastardy against said Wiggam to final judgment in the court below; that at its March term, 1885, such court adjudged that relatrix herein, Alice Maggard,

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should recover of said Wiggam the sum of \$400 for the support of her bastard child, to be paid in four equal instalments of \$100 each; that in such bastardy suit it was further adjudged by the court below that if said Wiggam should fail to pay or replevy said judgment, he should stand committed to the jail of Scott county. Said defendants averred that said Wiggam did not pay or procure replevin bail for the payment of the aforesaid judgment of \$400, or any part thereof; and that because of his refusal so to do, and in pursuance of such judgment, the sheriff of Scott county committed said Wiggam to the jail of such county in execution of said judgment.

The court below committed no error, we think, in overruling the demurrer of relatrix to the foregoing paragraph of answer. If the facts stated in such paragraph are true, and, as they are well pleaded, the demurrer admits their truth, they constitute a good partial defence precisely to the extent they were pleaded, namely, in mitigation of the relatrix's damages.

If, in pursuance of the judgment which relatrix herein recovered in her bastardy suit, the judgment defendant, Wiggam, was committed to the jail of Scott county, it is very clear that she could recover nothing more in this suit than the damages she had actually sustained by reason of Wiggam's escape from the custody of defendant Caldwell, as constable, prior to the rendition of such judgment.

The case of *Patterson v. Pressley*, 70 Ind. 94, wherein it was held, substantially, that a judgment in a bastardy suit that the defendant be committed to the jail of the county until the judgment be paid or replevied, is without authority of law, if the defendant is not in custody at the time such judgment is rendered, is overruled in the later case of *Lucas v. Hawkins*, 102 Ind. 65.

In the case last cited it is said that the attention of this court was not called to section 986, R. S. 1881, in force since May 6th, 1853, in *Patterson v. Pressley*, *supra*, or a different

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conclusion would have probably been reached. We do not doubt that the judgment recovered by the relatrix herein, whereof mention is made in her complaint in this action, that defendant Wiggam be committed to the jail of Scott county until he paid or replevied the relatrix's judgment against him, was fully authorized by the provisions of our statute regulating proceedings in bastardy. The facts stated by said defendants in the paragraph of answer we are now considering were sufficient, therefore, as a partial defence in mitigation of the damages which the relatrix was seeking to recover in this action. See *State, ex rel., v. Newcomer*, 109 Ind. 243.

2. The third paragraph of the joint answer of defendants Cruson and Sierp was pleaded by them as a partial defence in mitigation of the damages which relatrix sought to recover in this action. In such paragraph of answer said defendants alleged, among other things, that, at its March term, 1885, the court below tried and determined such bastardy suit of the relatrix herein against said Austin Wiggam, in the absence of said Wiggam, and rendered judgment against him in favor of relatrix herein for \$400, with interest and costs, and adjudged further that said Wiggam stand committed until he paid or replevied such judgment; that said Wiggam having failed to pay or replevy said judgment, a writ was duly issued by the clerk of the court below to the sheriff of Scott county, in pursuance of such judgment, for the arrest of said Wiggam and his commitment to the jail of such county; that, by virtue of such writ, said Wiggam was duly arrested and committed to the jail of such county until he should pay or replevy the aforesaid judgment; that no substantial right of relatrix herein was in any way lost, destroyed or impaired by any act of defendant Caldwell, as such constable, or of his co-defendants, as his sureties; that no damages had been sustained by relatrix herein on account of any action of defendant Caldwell, as such constable, or of his co-defendants, as his sureties. Wherefore, etc.

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The difference between the averments of this third paragraph of answer and those of the second paragraph of answer, heretofore considered, is one of form and phraseology rather than of substance or of facts pleaded. What we have said in considering the sufficiency of the second paragraph of answer, seems to us to be equally applicable to the third paragraph of answer. The facts stated in such third paragraph are abundantly sufficient, we think, to constitute a good partial defence in mitigation of the damages which relatrix has sued to recover in this action. They show very clearly that by the alleged escape of said Austin Wiggam from the custody of defendant Caldwell, as constable, relatrix had sustained nothing more than nominal damages, as Wiggam had been arrested and committed to the jail of the county, in execution of her judgment. This was the end of the law so far as Wiggam's person was concerned, and if he had never escaped from the custody of defendant Caldwell, as constable, she could not have had any further or better remedy against Wiggam's body than the answer shows she had notwithstanding such escape. The third paragraph of answer was good for what it purported to be, a partial defence in mitigation of damages. The demurrer to such third paragraph, therefore, was correctly overruled. Section 986, *supra*; *State, ex rel., v. Newcomer, supra*.

3. Under the alleged error of the court below in overruling the motion for a new trial, it is earnestly insisted in argument by the learned counsel of relatrix that it was error to admit evidence, offered by defendants, tending to impeach and contradict the constable's return of the warrant issued for the arrest of said Wiggam, in the bastardy suit of relatrix, and to show that defendant Caldwell, as constable, had in fact never arrested said Wiggam. It is no doubt true, as a general rule, that the return of a constable on a warrant in his hands, showing what he had done officially by virtue of such warrant, is binding and conclusive, not only on such constable, but also, perhaps, on his sureties

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on his official bond, and can not be contradicted by parol evidence, except in an action against such constable for making a false return. *Lindley v. Kelley*, 42 Ind. 294; *Splahn v. Gillespie*, 48 Ind. 397; *Stockton v. Stockton*, 59 Ind. 574.

We are of opinion, however, notwithstanding this general rule, that relatrix is in no condition to complain of the admission of the evidence to which her counsel objects, in the cause now before us. The warrant issued to defendant Caldwell, as constable, for the arrest of said Wiggam, in the bastardy suit of relatrix, was issued by a justice of the peace of Scott county, and could be served only, so far as appears, within such county. It is shown by the record of this cause that, on the trial thereof, defendant Caldwell was a witness for defendants, and was permitted, without any objection from the relatrix, to testify substantially as follows: "I was the constable and had the warrant in the suit against Wiggam; I went over into Jennings county to arrest Wiggam, and had four other men with me; I put three of them on one side of the house, and one man on the other side, and I went into the house; there were three rooms in the house; Wiggam was in the middle room; I told Wiggam I had a warrant for his arrest, and to consider himself under arrest; Wiggam told me to get out; I told him I guessed not, but he said I would; he began to back out, but just before he got to the door I jumped between him and the door; he then went back, and the lights were put out and I could not see any one; I stepped out and called for a light, and after awhile one of the women got a light and I started to go in the house; just then the men hallooed that he was running away; I ran around the house and chased him part of the way."

Here defendants' counsel asked the witness the following question: State what directions and instructions Judge Trulock, who was plaintiff's attorney in the case before the

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justice of the peace, gave you, or what he said to you about making out your return to this warrant?

To this question relatrix objected, on the ground that it was not competent for defendants, by parol evidence, to contradict, vary or control the constable's return on the warrant, because such return was conclusive as to the matters stated therein. The objection was overruled, and the witness answered, in substance, that he had made a statement of the facts about his efforts and failure to arrest Wiggam to Judge Trulock, the attorney of relatrix herein, who requested him to make his return, as he did, showing the arrest and escape of said Wiggam, so that the suit in bastardy might be prosecuted to final judgment. Manifestly, the evidence admitted over the objection of relatrix did not contradict, vary or control the constable's return, and was not, apparently, offered for any such purpose. By his previous testimony, admitted without any objection by or on behalf of relatrix, defendant Caldwell had flatly contradicted his return on the warrant, by showing that he had never in fact arrested Wiggam. Then, the question was propounded to him, to which relatrix objected. The obvious purpose of the question, as it seems to us, was to give the witness an opportunity to explain the apparent contradiction between his previous testimony on the trial of this cause and his return on said warrant. This he did by his answer to such question, and this he had the right to do. The court did not err in overruling the objection of relatrix to the question propounded to the witness.

Complaint is made on behalf of relatrix of the instructions of the court to the jury trying the cause. As we view this case, it is hardly necessary for us to set out or comment on any of these instructions.

The relatrix in her complaint has sued to recover damages for the breach of official duty by defendant Caldwell, as constable, in suffering the wilful or voluntary escape from his custody of said Wiggam, after he had been lawfully arrested on the warrant issued on the verified complaint in bastardy

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of the relatrix herein. This was the theory of the complaint herein, and the theory upon which the issues were formed and submitted to the jury for trial, as is clearly shown in the record of this cause. Upon this theory the case must be considered and decided here. Conceding that the constable's return is conclusive as to the fact of Wiggam's arrest, yet the evidence wholly fails to show that defendant Caldwell, as constable, committed the breach of official duty wherewith he is charged in the complaint of relatrix herein, by suffering the wilful or voluntary escape of said Wiggam from his custody. On the theory upon which this cause was tried, there is no substantial error, we think, in any of the instructions given by the court, either of its own motion or at the request of defendants.

On the whole case, as presented by the record, it has seemed to us that the merits of the cause have been fully and fairly tried, and that a right conclusion has been reached in the verdict and judgment in favor of defendants. In such a case, it is settled by many of our decisions that an erroneous instruction, if there be any, will not authorize or require the reversal of the judgment. *Norris v. Casel*, 90 Ind. 143; *Ledford v. Ledford*, 95 Ind. 283; *Sanders v. Weelburg*, 107 Ind. 266; *State, ex rel., v. Ruhlman*, 111 Ind. 17.

The motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

Filed May 28, 1888.

Proctor *et al.* v. Cole.

No. 13,303.

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120 111

PROCTOR ET AL. v. COLE.

PROMISSORY NOTE.—Endorsee.—Set-Off.—Nominal Holder.—Consideration.—

A claim, arising out of an independent transaction, and for which a merely nominal consideration has been paid, is not available as a set-off against a promissory note in the hands of an endorsee in good faith and for value, or even in the hands of a mere equitable assignee.

From the Elkhart Circuit Court.

J. M. Vanfleet, for appellants.

J. H. Baker, J. H. Defrees and *F. E. Baker*, for appellee.

ELLIOTT, J.—This suit is prosecuted upon three promissory notes and a mortgage securing them. The controversy has already been before this court, but in a somewhat different form, *Proctor v. Cole*, 104 Ind. 373.

The present appeal brings the case to us upon the following special finding: "That, on the 31st day of January, 1880, the defendant William Proctor executed the notes sued on, and on the same day he and his wife, the defendant Frances Proctor, executed the mortgage set out with the complaint, to secure the said notes, which mortgage was executed in due form of law and duly recorded; that the notes were made payable, with six per cent. interest and attorney's fees, to the order of Henderson Cole, at St. Joseph Valley Bank, Elkhart, Indiana, in eighteen and twenty-four months after date respectively; that, afterwards, on the 23d day of February, 1880, and before the maturity of either of the notes, Henderson Cole assigned the notes to Erastus B. Cole, by a written assignment, and afterwards, on the 26th day of February, 1880, he endorsed them in blank; that, on the 23d day of February, 1880, at the time when the notes in suit were assigned by Henderson Cole to Erastus B. Cole, they were in the hands of Baker & Mitchell, the attorneys of Henderson Cole, for safe-keeping; that, on said 23d day

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of February, Henderson Cole gave to Erastus B. Cole an order on Baker & Mitchell for the delivery to him of the notes; that, on the 26th day of February, 1880, Erastus B. Cole presented the order to Baker & Mitchell, and received from them the notes, and on the same day took them to Henderson Cole, who then endorsed the notes in blank by writing his name across the back of each of them; that the consideration for the transfer of the notes in controversy to Erastus B. Cole was as follows: In 1864 the wife of Henderson Cole, then residing in Indiana, sold property belonging to her, and received therefor the sum of \$3,500, which she sent to her husband, Henderson Cole, in Colorado, where he then resided, who used it in his own business; afterwards she removed to Colorado also, and while both were residing in Colorado, he promised at her request to pay this money, if he ever became able to do so, by paying it to Erastus B. Cole and Minnie Cole, the children of Henderson Cole and his said wife; that, in 1868, Henderson Cole's wife died in Colorado, and afterward, on the 23d day of February, 1880, in accordance with and in fulfilment of the promise, Henderson Cole assigned and transferred the said notes to Erastus B. Cole, he agreeing to pay to his sister, Minnie, one-half, which she agreed to; that, on the 25th day of February, 1880, the defendant William Proctor took such steps, and such proceedings were had, that the Elkhart Circuit Court, on the 25th day of February, 1880, issued a restraining order enjoining Henderson Cole from transferring the notes in controversy, which order was served on Henderson Cole on the 25th day of February, 1880; that Erastus B. Cole first learned of the injunction proceedings after he received possession of the notes, and before they were endorsed; that, on the 1st day of March, 1880, Erastus B. Cole took the notes in controversy to his uncle, Reuben Cole, the plaintiff in this action, who resided in Michigan, and asked him to buy them; that the plaintiff offered Erastus Cole \$2,000 for the notes, which offer was

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accepted, and thereupon Erastus B. Cole sold and delivered the notes to the plaintiff for that sum ; that the plaintiff in payment therefor then gave Erastus B. Cole an order on Myron E. Cole for \$500, and also executed and delivered to Erastus B. Cole his two promissory notes, one for \$1,000, payable in thirty days, and one for \$500, payable in seventeen months, to the order of Erastus B. Cole, at St. Joseph Valley Bank, in Elkhart, Indiana ; that when the plaintiff gave the order on Myron E. Cole he had no money in his hands, but he had a credit with him for that amount, and when he gave the order he executed and delivered to Myron E. Cole his note of \$500, payable in bank at Elkhart, Indiana, to the order of the said Myron E. Cole ; that the order on Myron E. Cole was duly accepted by him, and the note of \$1,000 was paid by the plaintiff, at its maturity, to Erastus B. Cole, and that the \$500 note remains untransferred and unpaid, and in the hands of the clerk of this court, where it was placed by order of the court ; the \$500 note by Myron E. Cole is also untransferred, is past due, and remains unpaid ; that the plaintiff had no knowledge of any defence to the notes in controversy, nor of the injunction proceedings then pending in the Elkhart Circuit Court against Henderson Cole on the 1st day of March, 1880—not until he had paid the note of \$1,000 ; that, on the 15th day of April, 1869, Henderson Cole executed his note of \$2,000, payable to the order of M. E. Cole ; that afterward M. E. Cole endorsed said note to Alma S. Wells, who transferred the note to the defendant William Proctor on the 25th day of February, 1880 ; that afterwards William Proctor recovered judgment in Elkhart Circuit Court against Henderson Cole on this note for \$4,198 ; that this judgment was recorded on the 12th day of April, 1880, at which time, also, the injunction was made perpetual ; that no part of the said judgment has been paid, and that it is the set-off claimed by the defendant in this action ; that the note of Henderson Cole

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transferred by Alma S. Wells to William Proctor was transferred for the consideration of one dollar—the said William Proctor agreeing at the time in writing that he would pay said Alma S. Wells an amount equal to one-half of the net proceeds that he might be able to make out of said note, either directly by way of collection, or indirectly by way of set-off, and that if he made nothing he should pay nothing to said Alma; that, on the 13th day of April, 1880, the defendant William Proctor brought an action in the Elkhart Circuit Court against Erastus B. Cole, in which it was in issue whether the said Erastus B. Cole was the equitable owner of the notes here in controversy on the 23d day of February, 1880, and prior to the time when the defendant William Proctor came into possession of the note of Henderson Cole by assignment from Alma S. Wells, and it was denied by the defendant that the defendant William Proctor, then the plaintiff, was the owner of the note assigned by Alma Wells to him and of the judgment rendered thereon; but it was alleged that he, the said Proctor, held the same in trust only, which facts were in issue in said action, wherein the jury trying said cause found the ownership of the note claimed by said Proctor to be as hereinbefore stated, and such proceedings were had in said cause that the said Elkhart Circuit Court, at its February term, 1884, found for the defendant therein, and adjudged that the said Erastus B. Cole was, on the said 23d day of February, 1880, the owner of the notes here in suit as by him alleged; that a reasonable attorney's fee on the notes in controversy is \$150; that there is now due on the notes in controversy the sum of \$3,020.74, payable without relief from valuation and appraisement laws; and that there is now due on the judgment of William Proctor against Henderson Cole the sum of \$5,716.75."

The law is with the appellee on the facts, and the judgment of the trial court is right. We do not deem it necessary to discuss in detail the propositions stated by the appellee's counsel in support of the judgment, nor do we find it

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necessary to decide the question of practice discussed by them. We are satisfied that such a set-off as that relied on by the appellants, acquired and held as it is, can not prevail against the title of the appellee. The right of the appellee is superior to that of the appellants' set-off, and to it their claim must yield.

In *Proctor v. Cole, supra*, we fully examined the nature of the appellants' claim and found that they had actually paid for it a merely nominal consideration, the trifling sum of one dollar. We do not believe that such a claim can in justice or equity be allowed to defeat the claim of an endorsee who purchased in good faith and yielded a valuable consideration. The appellee acted in good faith; he agreed to pay value for the notes he bought, and he did pay by the execution of negotiable instruments. He certainly is in a much better situation than the appellants, even if it be conceded that the title of his endorser, Erastus B. Cole, was infirm; but, according to the judgment of the court in a former action, there was no infirmity in the title of Erastus B. Cole. It would seem, therefore, that the question of title was adjudicated. Granting, however, that there was no adjudication in favor of Erastus B. Cole, still the facts found show that he had such a title as would defeat a set-off. Conceding still further that his title was infirm, yet, as against a set-off such as that asserted by the appellants, the title of the appellee is superior. He not only bought the notes in good faith and executed negotiable instruments for the consideration, but, prior to notice of the appellants' asserted set-off, he had actually paid the sum of fifteen hundred dollars.

Appellants' counsel assumes that a set-off is the same as a defence growing out of the transaction in which the notes were executed, and upon this assumption builds his argument. This assumption is not valid, and with it the entire argument falls. The set-off asserted is not a defence originating in the transaction out of which the notes sprang, but is an independent and distinct defence originating subsequent to

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the execution of the notes. *Hankins v. Shoup*, 2 Ind. 342; 1 Daniel Nego. Instr., section 746.

There is a clear and well defined distinction between a defence originating after the execution of a note, and growing out of an independent transaction, and a defence growing out of the transaction in which the note was executed. *Beard v. Dedolph*, 29 Wis. 136; *Ranger v. Cary*, 1 Met. 369; *Baker v. Arnold*, 3 Caines, 279.

The distinction between an independent defence, such as a set-off, and a defence arising out of the transaction in which the note was executed, has long been recognized. It is expressly recognized in *Hankins v. Shoup*, *supra*, and a recent writer says: "But a set-off arising out of a different transaction between the maker or acceptor and the payee can not be used as a defence against a purchaser for value after maturity." 2 Randolph Com. Paper, section 679.

The cases of *Dresser v. Missouri, etc., Co.*, 93 U. S. 92, and *Crandall v. Vickery*, 45 Barb. 156, are not in point, for in those cases the defence was fraud in procuring the execution of the note. But in the case before us we need not go so far as any of the authorities we have cited, for the title of the appellants to their asserted set-off is not of such a nature as to entitle them to defeat even the equitable holder of a promissory note. *Proctor v. Cole*, *supra*, and authorities cited. If it were granted that Cole's title is not perfect, still it is in every respect stronger and better than that of the appellants to their set-off, and should prevail against it. *Tinly v. Martin*, 80 Ky. 463. It is assuming much more than the law justifies to assume that the appellants are *bona fide* holders, and as such entitled to defeat the appellee. The total sum invested by them is a nominal one, and the investment of such a sum does not clothe a party with the rights of a *bona fide* purchaser. It is of the very essence of the claim to hold *bona fides*, that the party should have parted with value.

Counsel argues that as the appellee had only paid fifteen

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hundred dollars in money before notice of appellants' claim he can not recover more than that sum. It seems to us that the argument bears with much more force against his clients, who have paid only one dollar. We can not conceive how one who has invested no greater sum than that can justly be heard to urge the defeat of another's bargain, who has bought in good faith, executed negotiable instruments, and who has actually paid fifteen hundred dollars in money. Regarding the appellee as a mere equitable assignee, and not, as he well may be regarded, as an endorsee for value and in good faith, his rights are paramount to those of the appellants.

It is said that it is plain that Erastus B. Cole was not a *bona fide* purchaser, "because he took the legal title by endorsement after notice of the injunction, and he thereby became a *lis pendens* purchaser and was bound by the final judgment making the injunction perpetual." It need only be said in answer to this argument, that the special finding states that, in an action brought by William Proctor, it was adjudged that Cole was the equitable owner of the notes in suit on the 23d day of February, 1880.

Judgment affirmed.

MITCHELL, J., did not take any part in the decision of this case.

Filed May 28, 1888.

Sherlock v. The Louisville, New Albany and Chicago Railway Company.

No. 13,497.

SHERLOCK v. THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

RAILROAD.—Ejectment.—Statute of Limitations.—Adverse Possession.—Pleading.—A complaint in ejectment, against a railroad company incorporated under the laws of this State, which shows that the plaintiff has been the owner of the land sought to be recovered for more than twenty-five years, during all of which time the defendant has held adverse possession, is bad on demurrer as showing a cause barred by the twenty years' statute of limitations, and not within any of the exceptions to the statute.

SAME.—Trespass.—Adverse Possession Beginning With.—The fact that the railroad company took possession of the land as a trespasser did not prevent the running of the statute of limitations, and open and adverse use for twenty years was sufficient to establish a right of way.

SAME.—Damages.—When Action to Recover Barred.—Title acquired by an adverse occupancy for twenty years will defeat any claim that the original owner may have had for damages resulting from such occupancy. *Cox v. Louisville, etc., R. R. Co.*, 48 Ind. 178, distinguished.

SAME.—Private Nuisance.—Prescriptive Right to Maintain.—A right to maintain a strictly private nuisance upon the land of another may be acquired by prescription, and the time necessary to perfect a prescriptive right in this State is twenty years.

SAME.—Ejectment.—Injunction.—Estoppel.—A land-owner who has stood by for thirty years, and, without objection, allowed a railroad company to expend its money in the construction and repair of its road upon his land, is estopped to maintain either ejectment or injunction.

SAME.—Damages.—Successive Actions.—Where land is taken by a railroad company, all damages therefor, and all that naturally and proximately result from the proper construction and operation of the road, must be recovered in one action, as successive actions can not be maintained.

SAME.—Subsequent Purchaser.—Right of Action.—Such damages accrue to the person owning the land at the time of the construction of the road; they do not pass to a subsequent purchaser, except by a special stipulation, and to entitle him to maintain an action therefor he must procure an assignment of the claim.

SAME.—Defective Bridge.—Overflows Caused by.—Accruing of Cause of Action.—A subsequent grantee of land may maintain an action for damages resulting, during a freshet, from overflowing backwater caused by the negligent construction of a railroad bridge, prior to his purchase, over a natural watercourse flowing through his land, the cause of action for

115	22
116	259
119	124

115	22
124	582

115	22
130	104

115	22
131	181
131	182

115	22
135	350
135	429
136	592

115	22
149	349

115	22
168	210

115	22
170	59

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such damages accruing at the time of the overflow, and not at the time the bridge was constructed.

SAME.—*Prescriptive Right to Overflow Adjoining Lands.*—To constitute a prescriptive right in favor of a railroad company to overflow the lands of another, by maintaining an insufficient and negligently constructed bridge upon its right of way, it is not enough to show that the bridge has been maintained in the same manner for twenty years, but it must be shown that there has been a lapse of twenty years since such an invasion of the adjoining proprietor's rights as resulted in the accruing to him of a cause of action therefor.

SAME.—*Acquiescence.*—*Estoppel.*—The facts that the plaintiff and his predecessors in the title to the land had knowledge of the erection of the bridge and the manner of its construction, and made no objections, do not, in the absence of an averment that the plaintiff knew that the bridge would flood his land and that he acquiesced therein, create an estoppel against him.

SAME.—*Right to Remove Fences Encroaching Upon Right of Way.*—A railroad company has the right to remove, without liability for damages, fences constructed upon its right of way, lawfully acquired, by an adjoining land-owner.

From the Martin Circuit Court.

W. R. Gardiner, J. W. Buskirk and H. C. Duncan, for appellant.

G. W. Friedley and G. W. Easley, for appellee.

ZOLLARS, J.—A demurrer was sustained to the second and sixth paragraphs of appellant's complaint. That ruling is assigned as one of the errors for which the judgment should be reversed.

The substance of the second paragraph is, that appellant has owned a described tract of land for thirty years; that, in 1853, the New Albany and Salem Railroad Company, duly incorporated under the laws of this State, without having had damages assessed or tendered to appellant or his predecessor in the ownership of the land, and without his consent, or the consent of such predecessor, entered upon the land and constructed its road thereon; that said company and its successor, the appellee herein, also a corporation under the laws of this State, have ever since unlawfully

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continued to use the road so constructed, in the operation and moving of trains, and threaten to continue to so use the same; that said appropriation and use of the land thus occupied by the road have damaged the land and appellant in the sum of \$2,000. The prayer was for \$2,000 and a perpetual injunction against the further use of the road across appellant's land, in the running and operation of appellee's trains thereon, etc.

The substance of the sixth paragraph is, that appellant is the owner and entitled to the possession of a described strip of land thirty feet wide; that appellee, a railway corporation, incorporated under the laws of this State, unlawfully and without right, twenty-five years before the commencement of this action, went into the possession of the strip of land, and has continuously, without appellant's consent, held the possession and use of it, and, without right, kept him out of the possession of the same, to his damage in the sum of \$2,000. The prayer was for the possession of the land and for \$1,000 damages.

It will be observed that the sixth paragraph is in ejectment for the possession of the land occupied by the railway company for its road-bed. For that purpose the paragraph is clearly bad. It is averred in that paragraph, as will be seen, that the railway company entered and constructed its railway upon the strip of land twenty-five years before the bringing of this action, in 1884. It is also averred that the railway company took possession of and held the strip of land without the consent of appellant, and has ever since excluded him therefrom. It thus appears that the company had held the possession of the strip of land adversely to appellant for twenty-five years before he took any steps to recover it by action, and thus it appears that appellant's right to eject the company from the land is barred by the twenty years' statute of limitations. The rule is settled in this State, that a demurrer will not be sustained to a complaint on the ground that it shows a cause barred by the statute of limita-

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tions, unless it also appears that the cause does not come within any of the exceptions to the statute, where there are such exceptions. *Epperson v. Hostetter*, 95 Ind. 583, and cases there cited; *Lehman v. Scott*, 113 Ind. 76.

If there are no exceptions to the statute, or if it appear from the complaint that the cause does not come within the exceptions, where there are any, a demurrer will be sustained if it appear from the complaint that the statutory period of limitation has expired, and the case is otherwise within the statute. There are exceptions to the statute of limitations applicable here. One of them is, that any person being under legal disabilities when the cause of action accrues, may bring his action within two years after the disability is removed. R. S. 1881, section 296. Infants are persons under legal disabilities within the terms of the above section. R. S. 1881, section 1285; *Lehman v. Scott*, *supra*.

It clearly enough appears here that appellant's cause of action, as made by the sixth paragraph of his complaint, does not fall within this exception. It is shown by the averments in that paragraph, that he had been the owner of the land for at least twenty-five years, and that during that time it had been occupied by the railway company. If he was but one day old at the time the company entered upon and took possession of the land, he attained the age of twenty-one years four years before this action was commenced, and thus it appears that the railway company held adverse possession of the strip of land for more than twenty years, and that appellant did not commence his action within two years after his disability was removed.

It clearly enough appears, also, that the appellee was not, during any of the time during which it held the strip of land, a non-resident of the State or absent on public business, within the terms of section 297, R. S. 1881, which constitute other exceptions to the statute of limitations.

It is averred that the railroad company was incorporated under the laws of this State, and that it continuously held

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the possession of the strip of land, and maintained and operated its road thereon. And thus it appears that the company was a resident of this State, and was continuously present, operating its road.

That the company may have taken possession of the strip of land in the first place as a trespasser did not prevent the running of the statute of limitations.

Adverse possession is often wrongful, and may often commence by a trespass, but that does not prevent the running of the statute of limitations. That statute is a statute of repose, and may settle the title in an original wrong-doer.

The holding in the case of *Sibley v. Ellis*, 11 Gray, 417, is correctly stated in the syllabus, as follows: "Open and adverse use for twenty years will establish a right of way, although the user began in a trespass."

The conclusion above reached also disposes of the claim for damages as made in the paragraph under consideration. In an analogous case the Supreme Court of Massachusetts said: "The court are of opinion, that where a mill-owner and his predecessors have in fact enjoyed and exercised the right of keeping up his dam and flowing the land of another, for a period of twenty years, without payment of damages, and without any demand or claim of damages, or any assertion of the right to damages, it is evidence of a right to flow without payment of damages, and will be a bar to such claim. It is very clear, that to raise a dam on one's own land, by which the water is set back on another's, without grant from the latter, would be a tort, for which case would lie. If such a dam is continued twenty years, without action, complaint or protest, on the part of the land-owner, it is evidence of a right; and as such right may be and often is acquired by grant, it is taken to be presumptive evidence of a grant, and may be so pleaded." *Williams v. Nelson*, 23 Pick. 141. See, also, *Roots v. Beck*, 109 Ind. 472, and cases there cited.

When the presumption of a grant is thus raised by twenty years' occupancy, it can not be said that damages may be

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awarded against an occupant for having done that which he might legally do as the owner of the land. When time has made the occupancy right and legal, it has swept away all claim for damages by reason of that occupancy. A person can not be held liable for the occupancy of land which he had a right to occupy as against all others.

The case of *Cox v. Louisville, etc., R. R. Co.*, 48 Ind. 178, is relied upon by appellant in support of his contention that the twenty years' statute of limitations will not defeat a recovery for damages resulting from the alleged unlawful detention of the land by the railway company.

It is argued that that case lends support to the contention that the railroad as constructed and maintained, and operated by the moving of trains over it, was, and is, a continuing nuisance, and that each day's continuance is a new nuisance, for which damages may be recovered.

With reference to that case it should be observed, in the first place, that it arose out of an unauthorized construction of the railway upon a public street; and, in the second place, that it does not appear in the case that the street, or any part of it, had been adversely, or otherwise, occupied by the railway company for a period of twenty years. In those particulars the case is distinguishable from that before us. It should be observed, also, that the section quoted in the opinion in that case from Angell on Limitations is authority in support of the proposition, that an adverse occupancy for a period of twenty years will defeat a claim for damages resulting from such occupancy, as made here. The section thus quoted is in harmony with the Massachusetts case above, and with the rule laid down by Mr. Wood in his work on Limitations of Actions, at page 376, section 181, as follows: "While, as we have stated, each continuance of a nuisance is treated as a new nuisance, and furnishes a new ground of action which affords a good ground of recovery, although the statute may have run upon former injuries from the same nuisance, yet this proposition only holds good when the ac-

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tion is brought before the person erecting or maintaining the nuisance has acquired a prescriptive right to do so, by the lapse of such a period as bars an entry upon lands adversely held by another, that being the period universally adopted in this country for the acquisition of prescriptive rights," etc.

That a right to maintain a public nuisance can not be acquired by prescription, and that each day's continuance of such a nuisance is a new nuisance for which a public prosecution will lie, notwithstanding the nuisance may have been maintained for more than twenty years, is well settled. To that extent, and no further, go the authorities cited by appellant. See *State v. Phipps*, 4 Ind. 515; see, also, *Wood Law of Nuisances* (2d ed.), pp. 769, 770; *Pettis v. Johnson*, 56 Ind. 139.

It may be observed, however, that there are cases where the State may be estopped from maintaining such a prosecution. See *Hamilton v. State*, 106 Ind. 361.

The above authorities show, also, that a right to maintain what is strictly a private nuisance may be acquired by prescription, and that the time necessary to perfect a prescriptive right is the period which bars an entry upon lands adversely held by another, which, in most of the States, is twenty years. In that regard, those authorities are fully supported by the law writers and the adjudicated cases. See *Wood Law of Nuisances*, p. 763, *et seq.*, sec. 704, *et seq.*, and cases there cited; 1 *Hilliard Torts* (4th ed.), p. 653, and cases there cited; see, also, *Snowden v. Wilas*, 19 Ind. 10 (81 Am. Dec. 370); *Mitchell v. Parks*, 26 Ind. 354; *Postlethwaite v. Payne*, 8 Ind. 104.

If we regarded the case of *Cox v. Louisville, etc., R. R. Co.*, *supra*, as really in conflict to any extent with our conclusion here, we should feel constrained to overrule it to that extent.

If, then, it may be said here, that the road, as constructed and operated over appellant's land without his consent and without compensation first paid, was, in any sense, a nuisance, it was nothing more than a private nuisance, and it is very

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clear that there can be no recovery for damages resulting from such construction and operation, because more than twenty years of occupancy and user have made that construction and operation lawful.

Our conclusion is, that the sixth paragraph of the complaint was not good, and that the demurrer thereto was properly sustained.

While the second paragraph is not, in a strict sense, for the possession of the land and the ejectment of the railway company therefrom, practically it amounts to the same thing. For all practical purposes the company might as well be ejected from the land as to be perpetually enjoined from operating its trains over the road. It is shown by the averments in the paragraph that the road was constructed upon and across the land in 1853, thirty-one years before the action was commenced, in 1884. If it be said that the construction and operation of the road, because without the consent of appellant and his predecessor in the ownership of the land, was thus constructed and operated against their will, then we shall have a case of adverse possession for more than twenty years, and all that has been said in relation to the sixth paragraph of the complaint is applicable here, and the second paragraph must be held bad.

While the construction of the road upon the land is alleged to have been without the consent of the owners of it, there is no averment that they at any time objected, or took any steps to prevent such construction. For more than thirty years they stood by and allowed the railway company to expend its money in the construction and repair of the road. They ought now to be held as acquiescing in the construction and operation of the road. It is too late now to eject the company from the land, or to invoke the aid of a court of equity to enjoin it from operating the road, which would be, practically, the same thing. It was intimated in the case of *Cox v. Louisville, etc., R. R. Co., supra*, relied upon by appellant, that the land-owner might at any time

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enjoin the use of the road by the railway company, had the company claimed the right to continue the use of it. So far as that case holds, or impliedly holds, such a doctrine, it has been distinguished, and impliedly disapproved, in the later cases, by the statements that no question was there made upon the delay in bringing the action, and by the holdings that, after a long delay, courts of equity will not interfere by enjoining the operation of the road by the company. *City of Logansport v. Uhl*, 99 Ind. 531 (50 Am. R. 109).

We can not do better here than to repeat what was said in the recent case of *Midland R. W. Co. v. Smith*, 113 Ind. 233, viz.: "As has been seen, relief by injunction will only be granted when application therefor is seasonably made. A land-owner who stands by and acquiesces until a railroad corporation has expended its money and constructed its track across his land, so that the track at that point becomes a part of its line, will not thereafter be entitled to invoke the aid of a court of equity in arresting an enterprise in which the public, as well as the railroad company, has an interest. Upon considerations of public policy, as well as upon recognized principles of justice, courts of equity will refuse to interfere after a railroad corporation has entered upon land with the consent or by the license of the owner, and has expended money in the construction of its road upon the strength of such license or consent, or where the land-owner has acquiesced in the use of his land by the railroad company until the public interest or convenience becomes involved. *Campbell v. Indianapolis, etc., R. R. Co.*, 110 Ind. 490, and cases cited; *Chicago, etc., R. W. Co. v. Jones*, 103 Ind. 386; *Buchanan v. Logansport, etc., R. W. Co.*, 71 Ind. 265; 2 Rorer Railroads, 741, 750, 751; 2 Wood Railway Law, 794."

The holding in the case of *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 581, is in substance as follows: Where a railroad company enters upon land without right, and, with the knowledge and acquiescence of the owner, constructs a rail-

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road thereon, and operates its railroad in the public service until public rights have been acquired, this will, on the ground of public policy, preclude him from severing the line of railroad by a possessory action. See, also, *Cincinnati, etc., R. R. Co. v. Clifford*, 113 Ind. 460; *Evansville, etc., R. R. Co. v. Nye*, 113 Ind. 223; *McAulay v. Western Vermont R. R. Co.*, 33 Vt. 311.

The paragraph under consideration does not make a case which would justify the court in enjoining the operation of the road by the company. Neither does it make a case for damages. It is clearly shown that the road was constructed upon the land before appellant became the owner of it. It is settled in this State, that, where land is taken by a railway company, all damages for such taking must be recovered in one action, and that the owner of the land can not maintain successive actions therefor. In such action, all injuries that may naturally and proximately result from the construction and operation of the railway may be recovered. Such damages accrue to, and must be recovered by, the person who owned the land at the time the road was constructed. The claim for such damages is a chose in action which does not pass to the grantee of such owner by deed or otherwise, unless by a special stipulation. In order to entitle a grantee to maintain an action for such damages, he must first procure an assignment of such claim. *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 308, and cases there cited.

Before proceeding to a consideration of the second paragraph of appellee's answer, the demurrer to which was overruled, it is necessary to notice, briefly, the third, fourth, fifth and eighth paragraphs of the complaint to which it is addressed. The substance of the third paragraph is, that, in 1883, appellant was the owner of a described tract of land over which appellee owned and operated its railway; that, at that time, the appellee, without right, wrongfully and unlawfully entered upon his said land, and, without right, tore down and rendered worthless plank and rail fences of the

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value of \$200; that the fences were necessary, at the places where they had been constructed, for the proper cultivation of his land, and that appellant threatens to tear down the fences as often as they may be rebuilt upon the line from which it removed them. Prayer for judgment for damages, and for an injunction to prevent appellee from interfering with the construction and maintenance of the fences.

The substance of the fourth paragraph is, that appellant is the owner and entitled to the possession of a strip of land thirty feet wide, which is particularly described, and that appellee has unlawfully kept him out of the possession of it for ten years, to his damage. Prayer for possession and damages.

The fifth paragraph is very much the same as the third.

The substance of the eighth paragraph is, that for twenty years past appellant has been the owner of a described tract of land; that, in 1853, appellee, then a railway corporation under the laws of this State, by the consent of the owner of said land, appellant's predecessor in the ownership of the land, constructed its railway upon and across the land, and continued to use the same until the 1st day of July, 1882, with the knowledge and consent of appellant and his said predecessor in ownership, at which time appellant objected to any further use of the road upon said land, and demanded the possession of the land occupied by the road; that the appellee refused to yield the possession; that it has never had compensation assessed or tendered to him. Prayer for the possession of the land occupied by appellee's road and the ejectment of appellee therefrom.

If the second paragraph of the answer were addressed to the above eighth paragraph of the complaint alone, there could be no question of its sufficiency, because, whether good or bad, it would be sufficient for that paragraph, which is clearly bad. It shows that for more than twenty years appellant and his grantor acquiesced in the occupation of the land by the railway company. After such an acquiescence

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it is too late now to ask for an ejectment of the railway company from the land.

The answer, however, as we have seen, is addressed to other paragraphs, which appear to be good. It is necessary, therefore, to examine the answer.

It must be regarded as intended to meet those paragraphs of the complaint which charge appellee with the unlawful removal of the fences and the unlawful possession of the strip of land. The substance of the answer is, that the New Albany and Salem Railroad Company was incorporated under an act entitled an act to provide for the continuance of the construction of all or any part of the public works of the State by private companies, approved on the 28th day of January, 1842 (Acts 1842, p. 1), and was so organized and incorporated for the purpose of completing as a railroad a certain proposed macadamized highway running from New Albany to Salem, which had been partially constructed under the improvement act of 1836; that by said act of 1842 said railroad company was empowered to so build said railroad and extend the same to the north part of the State, and was given all the franchises and powers of the State in that behalf; that in 1848 an act was passed and approved (Local Laws, 1848, p. 456), in which it was provided that said railroad company should enjoy all the powers conferred upon the State by the act to provide a general system of internal improvement, approved January 27th, 1836 (Acts 1836, p. 6), and said act of 1842, *supra*; that by an act of January 30th, 1849, it was further enacted that said railroad company, by its board of directors, should, in the assessment of damages in relation to all necessary rights of way, possess the same powers and perform the same duties that were possessed and performed by the board of internal improvement, as prescribed in the 16th and 17th sections of said act of 1836; that, being so organized, said company constructed its railroad from New Albany to Salem, and, having caused the

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proper surveys to be made in 1853, extended its line to Michigan City, and appropriated land therefor; that, at the time the railroad was constructed across the land now owned by appellant and described in the complaint, said land was owned by one Chambers, who had full knowledge of the acts of said company in taking possession of the land and constructing its road thereon, and made no objection nor claim for damages; that appellee is the owner of the road so constructed by the New Albany and Salem Railroad Company, and by itself, and its said predecessor in title, has been in the full possession thereof, operating the same, since 1853 until the present time; that during all of that time no owner of the land ever objected or claimed damages until this action was commenced; that in appropriating a right of way through the land now owned by appellant, said New Albany and Salem Railroad Company took no more than was necessary for the construction and operation of its road, and that the amount so taken did not exceed sixty feet, which strip so taken and appropriated is the land claimed in appellant's complaint; that in 1883 appellant entered upon appellee's road-bed, and within the sixty feet so appropriated through his land, and erected fences thereon so close to the track of the road as to interfere with the proper repair and management thereof, and thus forcibly asserted a right to said right of way theretofore appropriated as aforesaid; that appellee, by its servants and agents, peaceably removed the fences from its right of way, using no more force than was necessary, which is the grievance complained of in the third and fifth paragraphs of the complaint; and that the right of way thus appropriated is the land which appellant asks the possession of in the fourth and eighth paragraphs of his complaint.

It will not be necessary for us to here go into an extended examination of the several acts under which the New Albany and Salem Railroad Company was incorporated, and under which it had authority to appropriate land for its right of

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way. The board of internal improvement had authority to enter upon and appropriate any land necessary for the prosecution and completion of the improvements contemplated in the act of 1836. Acts 1836, p. 13, section 16. The New Albany and Salem Railroad Company was given the same authority, and "to enter upon and take possession of any lands * * which may be necessary for the construction of any such work, and to make the same available." See *Peck v. Louisville, etc., R. W. Co*, 101 Ind. 366.

The averments of the answer, in some respects, are not as formal and specific as they might have been made, but we think that, as against the demurrer, it is sufficiently shown that a strip of land sixty feet wide through the land now owned by appellant was appropriated, and that a strip that wide was necessary for the completion of the road, and to make it available; and, further, that appellant constructed his fences upon the strip of land thus appropriated and used by the railway company for about thirty years. Our conclusion, therefore, must be, that appellant can not recover from the railway company the land thus occupied, and can not build fences upon it; and, further, that the railway company had a right to remove the fences, as it did, and is not liable therefor; and, finally, that the demurrer to the answer was properly overruled.

It is further insisted, on behalf of appellant, that the court below erred in overruling a demurrer to the sixth paragraph of appellee's answer. That paragraph is addressed to the first paragraph of the complaint, in which it is charged, in substance, that appellant has been the owner of certain described lands since 1862, across which appellee, in 1883, owned and operated its railroad; that, prior to that date, appellee had constructed a bridge on the line of its road over a stream of water flowing through his land; that the bridge was negligently constructed, and, up to 1883, negligently maintained so low and short, and with such trestles under it, that the water of the stream which collected above it did

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not, and could not, pass under it; that by reason of such obstruction, in 1883, the water was diverted from its channel and backed up and set back upon appellant's lands and destroyed his fences and growing crops.

The substance of the sixth answer is, that the bridge was first built in 1853, where it now is, and has since remained, by appellee's predecessor in the title to the railroad, the New Albany and Salem Railroad Company, and has been maintained in its present condition ever since; that it was so built, and has all the time been maintained, with the full knowledge of and without objection from appellant or his predecessor in the title to the land; that, with full knowledge on their part of the manner in which the bridge was constructed and has been maintained, and of the liability of the overflow of the land by the stream, neither of them, at any time, complained of or made any objection to the bridge as constructed and maintained; and that appellant "has so acquiesced and consented with full knowledge that defendant (appellee) has expended large sums of money on said bridge and said track, and other bridges leading thereto. Wherefore defendant says that he (appellant) is estopped from asserting any claim for damages by reason of the premises."

After a careful consideration we are of the opinion that the first paragraph of the complaint makes a case for damages, and that the case as thus made is not met and overthrown by the above paragraph of answer.

That a railway company will be liable for the overflow of adjoining lands which results from the negligent construction of a bridge over a natural watercourse, is well settled. 1 Redfield Railways (6th ed.), p. 341, *et seq.*

Whatever damages resulted, or might reasonably result, from the appropriation of the land and the proper construction of the road thereon, accrued in favor of Chambers, who owned the land at the time that that portion of it occupied by the road was appropriated. The right to recover those damages did not pass to appellant. When we have said this

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much we think we have gone as far as we should in denying a right of recovery to a subsequent owner of the land.

That the bridge would be negligently constructed, or, if so constructed, that it would at any time cause injury and damage by causing the stream to overflow the lands outside of the right of way, could not have been sufficiently known, until such an overflow occurred to authorize the assessment of damages in advance. And, assuming that such an overflow might be occasioned by the bridge, it would be impossible, in advance of such overflow, to make even an approximately correct estimate of the damages that might result. When the injury did occur by reason of such overflow, it was not the probable and proximate result of the construction of the road, but the result of an act of negligence, in connection with more than a usual amount of water in the stream. See *St. Louis, etc., R. W. Co. v. Morris*, 35 Ark. 622.

While the complaint is not as definite as it ought to be, it is apparent that the overflow in 1883 was at a time of high water, and would not have occurred but for such high water. Because the overflow here complained of did not occur while Chambers owned the land, because such an overflow was not the result of the proper construction of the road, and because it could not have been so known that such an overflow would result from the negligent construction of the bridge that damages could have been assessed in advance, it can not be said that the damages here complained of did, or could, accrue in favor of Chambers. See *Mills Eminent Domain*, section 217, and cases there cited; *Pierce Railroads*, p. 179, and cases there cited; *Southside R. R. Co. v. Daniel*, 20 Grat. 344.

It has been said that a cause of action may be said to be the right of the plaintiff, and the obligation, duty or wrong of the defendant, and that these combined constitute the cause of action. *Veeder v. Baker*, 83 N. Y. 156 (160); *Baker v. State, ex rel.*, 109 Ind. 47 (61).

Accepting that definition as correct, it may be said here

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that the right of the plaintiff was to have his land free from the overflow, and to recover the damages resulting therefrom ; and that the wrong of the railway company was the negligent construction and maintenance of the bridge. These could not combine until the overflow occurred, and hence the cause of action accrued in favor of appellant, and not in favor of his grantor.

Mr. Redfield, in his work on Railways, at page 595, vol. 1 (6th ed.), says: "The general rule, in regard to the time of the accruing of the action is, that, when the act or omission causes direct and immediate injury, the action accrues from the time of doing the act, but where the act is injurious only from its consequences, as by undermining a house or wall, or causing water to flow back at certain seasons of high tide or high water, the cause of action accrues only from the consequential injury. In the case of *Backhouse v. Bonomi* (9 H. L. Cas. 503), it was held that no cause of action accrued from defendant's excavation in his own land, until it caused damage to plaintiff's."

The case of *Moison v. Great Western R. W. Co.*, 14 Upper Canada Q. B. 109, arose out of the imperfect and negligent construction of a bridge over a stream crossed by the railroad, and the consequent flooding of the lands of the plaintiff. It was contended in that case that the plaintiff, who claimed damages by reason of the overflow of his land, could not recover, for the reason that the injury proved resulted from the construction of the defendants' works, and that the plaintiff's only remedy was under the arbitration clause of the charter ; and, further, that, as it did result from the construction of the defendants' works, and the bridge had been constructed upwards of two years before the commencement of the suit, the plaintiff could not recover. That contention was based upon a statute which provided that all suits "for indemnity for any damage or injury sustained by any person or persons *by reason of the said railway*, shall be instituted within six calendar months next after the time of

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such supposed damage sustained, or if there shall be a continuation of damage, then within six calendar months next after the doing or committing such damage shall cease, and not afterwards."

The contention on the part of counsel for the railway company presented the question, whether the cause of action accrued at the time the bridge was constructed, or at the time the injury was caused by the overflow. If at the former time, the action was brought too late, under the statute.

Upon the question thus presented, ROBINSON, C. J., said: "As regards the limitation of time for bringing the action, we think that the plaintiff was properly entitled to succeed, both on the second and fourth pleas, for that the cause of action first arose when the damage was suffered, there being no complete cause of action till the damage was sustained. The defendants were guilty of no illegal act that could have been complained of as a trespass, and till it proved to be injurious there was no right to sue."

BURNS, J., said: "No matter how unskilfully the works were constructed, if they answered the purposes of the defendants' railway, no one could complain of that; but it is when those unskilful works occasion injury to others in places where, perhaps, it was supposed they could not exert or have an influence, that a cause of action arises to such persons. The plaintiff complains that his land was overflowed by means of the defendants' works, and as proved that most certainly did happen within six months next before the bringing of the action."

In the case of *Vanhorn v. Grand Trunk R. W. Co.*, 18 Upper Canada Q. B. 356, the same question was involved, and ROBINSON, C. J., again said: "I think no objection lies in this case to the action which is brought, not for any thing being done that was necessarily done in carrying on the work, but for an alleged injury not foreseen, and first experienced long after the railway was completed, and an injury attributed solely to the unskilful and negligent manner of

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constructing a culvert. As to the action not being brought in time, I am of opinion that the objection is not tenable, for there was no right of action till the plaintiff's land had received injury from the freshet," etc.

BURNS, J., said: "Upon the first point made for nonsuit, the question is, when did the plaintiff's cause of action arise. Was it when the railway was first constructed, or at the time the plaintiff's land was flooded? The words of the 20th section of 14 and 15 Vic., ch. 51, are that 'all suits for indemnity for any damage or injury sustained by reason of the railway, shall be instituted within six calendar months next after the time of such supposed damage sustained.' It was not possible for the plaintiff to know whether the defendants' works would or would not do him an injury until those works were tested, and no test could be applied until it was done by nature. * * * If this plaintiff had brought an action before his land was flooded, upon the idea that it might be so at some future period, surely the answer would have been that he was premature, for no one could know that he would ever sustain any injury. When the land was overflowed then his case came within the rule of *damnum et injuria*, and then his cause of action arose." See, also, *Dickson v. Chicago, etc., R. R. Co.*, 71 Mo. 575.

Our conclusion upon this feature of the case is, that the sixth paragraph of the answer can not be held good upon the theory that it shows that the right of action set up in the first paragraph of the complaint accrued, or could have accrued, in favor of Chambers, and did not accrue in favor of appellant.

It results from what we have said, also, that appellant's right of action, as set up in the first paragraph of the complaint, was not barred by any statute of limitations, nor affected by the lapse of time simply, unless it may be said that the railway company had, prior to the overflow of 1883, acquired such a prescriptive right to maintain the bridge as it was at that time as to exonerate it from all liability for

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damages resulting from such overflows; or, in other words, had a prescriptive right to overflow appellant's lands. Had the company acquired such a right? This inquiry may be considered in connection with that portion of the eighth instruction, in which the jury were instructed that they could not award damages to appellant for the injury occasioned by the overflow of his land outside of the right of way, if they should find that the bridge had been constructed and maintained continuously, uninterruptedly and adversely for twenty years or more.

That instruction was predicated, doubtless, upon the theory that if the bridge had been maintained in the manner stated for twenty years, the railway company had thereby acquired a prescriptive right to maintain it, and, therefore, was not liable for the damages resulting from the overflow caused by it, although it may have been negligently constructed and maintained; in other words, that the railway company had thus acquired a prescriptive right to overflow appellant's land by maintaining an insufficient and negligently constructed bridge upon its right of way.

There are important elements lacking here which are essential to a prescriptive right in the railway company to flood appellant's lands.

The whole case is upon the theory that all of the injury complained of, and, so far as shown, all that has resulted to appellant's lands by reason of the defective bridge, was caused by the overflow of 1883. That overflow was the result of a freshet in the stream, in connection with the insufficient bridge.

Assuming that the railway company owned the right of way through appellant's lands, as is assumed in the answer and instruction, there is no claim in either, nor, as we understand, in the evidence, that in times of ordinary water the bridge caused any overflow of appellant's lands, or in any way operated as an invasion of any of his rights.

So long as no injury resulted to appellant, it was entirely

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immaterial to him in what manner the bridge was maintained by the railway company upon its own land. The bridge being upon its land, his rights could in no way be invaded by its maintenance until he, in some way, suffered an injury by such maintenance. Until then, it was neither harmful nor a matter of inconvenience even to him.

Until a person's rights are in some way invaded, they can not be destroyed or transferred to another by prescription.

Time—in this State twenty years—is an essential element in the establishment of a prescriptive right, and, in a case like this, begins to run only from the date at which a cause of action accrues in favor of the party against whom the right is asserted.

As we have seen, in this case no cause of action accrued to appellant, by reason of the negligent construction of the bridge, until the overflow of his land in 1883, much less than twenty years ago.

In speaking of the right by prescription to exercise a noxious trade, Mr. Wood, in his work on Limitation of Actions, at page 377, section 182, says: "But, in order to establish the right as against any party complaining, the burden is imposed upon the defendant, who sets up the right as a defence, of proving that for the period of twenty years he has sent over the premises in question from his works an atmosphere equally as polluted and offensive as that complained of. Proof that he has polluted the air is not enough: he must show that for the requisite period he has sent over the land an atmosphere so impure and polluted as to operate as an actual invasion of the rights of those owning the premises affected thereby, and in such a manner that the owner of the premises might have maintained an action therefor. Less than that is insufficient. He must also show that his user at the time when the action is brought is not substantially in excess of that which he has exercised during the period requisite to acquire the right. * * * In order to establish a right by prescription, the acts by which it is

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sought to establish it must operate as an invasion of the particular right which it is sought to quiet, to such an extent that during the whole period of use the party whose estate is sought to be charged with the servitude could have maintained an action therefor."

Mr. Wood, in his work on the Law of Nuisances, at section 708, says: "There is a distinction between a prescriptive right to do some act upon one's own premises that operates injuriously to another, and a right to do some act upon another's premises. In the latter case, each act of user, before the user ripens into a right, is a trespass, for which an action may be maintained at any time, while in the former no action can be maintained until some *right* has been invaded. In the one case there is an actual invasion of the property itself, while in the other there is a mere invasion of some right. * * * The rule is, * * * that to constitute an adverse user requisite to sustain the right, it must be shown that the user had actually invaded the rights of the person against whom the claim is made, in reference to the particular matter which is the subject of complaint, and that the user, during the entire statutory period, and the invasion of the right, have produced an injury equal to, and of the character complained of, and of such a character and to such an extent that at any time during that period an action might have been maintained therefor."

Applying to the case in hand the above rules of law laid down by the authors named, which are abundantly established by the cases cited by them, and by many others that might be cited, it must be held that it is not shown by the sixth answer that the railway company had a prescriptive right to flood appellant's lands, for the reason, among others, that it is not shown that, by the erection and maintenance of the bridge, it in any way invaded any of his rights prior to the overflow of 1883, nor that any cause of action accrued to him on account of such erection and maintenance of the bridge prior to that date. Neither is it shown by the evi-

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dence that there was any such invasion of appellant's rights, or that such cause of action accrued to him prior to the overflow of 1883. For these reasons the sixth paragraph of the answer is bad, and the eighth instruction is erroneous.

It is averred in that paragraph of the answer, that appellant and his predecessors in the title to the land had knowledge of the construction of the bridge, and of the manner of its construction, and made no objections. Those averments, when admitted as true, do not make an estoppel against appellant. It is not averred that he knew that the bridge would flood his land, nor that he acquiesced in such flooding. See *Miller v. Stowman*, 26 Ind. 143 (149).

The fifth paragraph of the answer is also bad, in that it purports to answer the whole complaint and answers but a portion of it.

Whether or not the flood of 1883, which, in connection with the bridge, caused the overflow of appellant's land, was an extraordinary flood, and such as the railway company was not bound to anticipate and provide against in the erection and maintenance of the bridge, are questions which we need not, and do not, now decide.

There are a number of other questions discussed by appellant's counsel, but we do not think that it would be profitable to extend this already lengthy opinion to decide them upon this appeal.

Judgment reversed, at appellee's costs, with instructions to the court below to sustain appellant's motion for a new trial, and to sustain his demurrer to the fifth and sixth paragraphs of appellee's answer.

Filed May 28, 1888.

Williams v. Lewis et al.

No. 13,206.

WILLIAMS v. LEWIS ET AL.

115	45
121	90
122	231
115	45
152	457

PARTNERSHIP.—Execution.—Sale of Firm Property for Individual Debt.—Injunction.—While the interest of a partner in the firm property may be sold upon execution for his individual debt, specific articles of partnership property can not be so sold, and injunction will lie at the suit of the firm.

SAME.—Declarations of Partner.—Estoppel of Firm.—Notice.—Tender.—The declarations of one partner, in the absence of the other members of the firm, that certain property is the individual property of the partner for whose debt it is taken, are not within the scope of his powers as a partner, and do not estop the firm from suing to set the sale aside and to enjoin the removal of the property, which they may do without tendering the money paid by the purchaser; nor can the acquiescence of one partner in the sale of the firm property for the debt of another partner, bind the members of the firm having no notice.

From the Switzerland Circuit Court.

W. R. Johnston, J. D. Works and L. O. Schroeder, for appellant.

J. B. McCrellis and G. S. Pleasants, for appellees.

MITCHELL, J.—Complaint by James W. Lewis, Benjamin W. Simmons and James C. Long against John E. Williams to set aside a constable's sale of certain personal property, and to enjoin the defendant from removing property alleged to have been wrongfully sold to and purchased by him at such sale.

It is charged in the complaint that, in February, 1885, the plaintiffs, as partners, under the name of Lewis, Simmons & Long, were the owners of a stationary steam saw-mill, with engine, boiler, carriage-way, trucks, eleven saws, and other attachments complete, all of which were situate in the city of Vevay, Indiana, and that the partnership affairs remained unsettled, the firm being still indebted to divers persons, whose names are set out.

It is averred that a judgment had been recovered against

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James W. Lewis, one of the partners, for an individual debt, and that an execution had issued thereon, in virtue of which the constable had seized and sold the engine and boiler, and the saw-frame and eleven saws above mentioned, as the individual property of Lewis.

It is further averred that the only interest which Lewis had in the property so levied upon and sold arose from his being a member of the firm of Lewis, Simmons & Long, and that the only interest Williams had was such as he acquired through the constable's sale above mentioned.

It is averred that Williams and his employees were proceeding to tear down and remove the engine and boiler, and other articles which he assumed to own in pursuance of the purchase made as above, and that to detach and remove those articles would render the residue of the partnership property practically useless.

It was also charged that the defendant, Williams, was notoriously insolvent. Prayer that the sale be set aside and the defendant enjoined from interfering with the property.

Williams answered, among other defences, that the firm of Lewis, Simmons & Long had ceased to transact business about a year before the sale under which he claimed, and that he was not aware at the time he purchased the property that it belonged to the firm of Lewis, Simmons & Long. He alleged further that, before the execution was issued, Lewis claimed to own the whole of the property, and that he was offering to sell it to Simmons. He charged further that, before he bought the property, the constable to whom the execution was issued called upon Simmons and informed him that he had an execution against the property of Lewis, and that he was about to levy on the property now in dispute, and that Simmons informed the defendant and the constable that the property belonged to Lewis individually, with the exception of a few dollars invested therein by the other partners in the way of repairs.

It is averred that Simmons was in Vevay from the time

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of the levy until the day of the sale ; that he knew the property was advertised for sale, and that he made no objection, nor gave any notice of the claim of the firm, and that he again told Williams, on the day of the sale, that the property belonged to Lewis individually.

The court sustained a demurrer to the answer, and the propriety of this ruling is made the principal subject of discussion.

That the interest of one partner in the goods or property of the firm may be seized and sold upon execution for his individual debt, can not be doubted ; and it is likewise settled, that, as incidental to the right of sale, the officer may, without interfering with the rights of the other partners, take possession of the interest seized, and deliver it to the purchaser, who takes subject to the rights of the other partners, and to the contingency that an accounting may show that he took no beneficial interest by the purchase. The purchaser can not acquire specific articles of property at such a sale ; but, if the creditor of one partner sells his debtor's interest in the firm property, the purchaser may ultimately obtain any surplus that may remain after the firm creditors are paid, and the partnership accounts fully adjusted. *Ex Parte Hopkins*, 104 Ind. 157 ; *Deeter v. Sellers*, 102 Ind. 458 ; *Donellan v. Hardy*, 57 Ind. 393 ; 2 Lindley Partnership, 690.

Specific articles of partnership property can not be levied upon and sold to satisfy the individual debt of one partner, and when the officer, instead of selling the whole interest of the execution debtor, sells the whole of certain specified articles of property belonging to a firm, the other owners may treat him as a trespasser, and may enjoin the sale or the delivery of the articles so sold. *Stumph v. Bauer*, 76 Ind. 157 ; *Branch v. Wiseman*, 51 Ind. 1 ; *Moore v. Pennell*, 52 Maine, 162 (83 Am. Dec. 500, and note) ; *Spalding v. Black*, 22 Kan. 55 ; *Atkins v. Saxton*, 77 N. Y. 195 ; *Miner v. Pierce*, 38 Vt. 610 ; 2 Lindley Partnership, 690.

Without disputing the propositions above stated, it is con-

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tended on appellant's behalf that the declarations made by Simmons, one of the partners, to the effect that the property levied upon and sold was the individual property of Lewis, estopped the former from afterwards asserting, as against the appellant, who bought on the faith of his declarations, that it was the property of the firm. It is insisted, moreover, that notice to Simmons that the property was about to be sold as the property of Lewis was notice to the firm, and that his acquiescence in the sale, and his declarations in respect to the title, not only estopped him, but the firm of which he was a member, as well.

It appears from the pleadings that both Lewis and Long were out of the State at the time, and had no knowledge of the levy and sale; that, although the firm had ceased carrying on its business, the debts had not yet been paid, nor the partnership account settled, nor the partnership property disposed of.

It is undoubtedly true that each partner is, in a qualified sense, the agent of his copartners in relation to the business of the firm, and that his acts and declarations in reference to the business in which he is at the time employed, within the scope of the partnership, are the acts and declarations of the firm; but one partner can not, by his acts or declarations, in the absence of the others, deprive them, or either of them, of their interest in the firm property. *Rush v. Thompson*, 112 Ind. 158; *Bays v. Conner*, 105 Ind. 415; *Hickman v. Reineking*, 6 Blackf. 387; *Union Nat'l Bank v. Underhill*, 102 N. Y. 336; *Kaiser v. Fendrick*, 98 Pa. St. 528.

The agency which exists between partners pertains only to the business of the firm, and the declarations of one partner which bind the others are such as pertain to, and are made while employed about, the business of the partnership. *Boor v. Lowrey*, 103 Ind. 468 (53 Am. R. 519); *Winchester, etc., Co. v. Creary*, 116 U. S. 161; *Avery v. Rowell*, 59 Wis. 82.

Certainly, one partner can not admit away the interest of his copartners in the partnership property, or transfer the

interest of one partner to the individual creditors of the other in the absence of both ; nor can he, by his declarations, make that a partnership transaction which does not appear to be such. *Blaker v. Sands*, 29 Kans. 551.

Whatever the motive of Simmons may have been in asserting that the property belonged to Lewis individually, the declaration was not made during the progress and within the scope of the partnership business.

While one partner may, under certain circumstances, in the absence of the others, dispose of the firm property or pledge it for a firm debt, he can not, by an admission in the absence of the other partners, convert that which was the property of the firm into the property of one of its members, and thus divert it from the payment of partnership debts. *Bond v. Nave*, 62 Ind. 505.

Neither can one member of a suspended firm, by standing by, estop the other members, who are absent, from asserting their interest in the partnership property.

The present case is not within the principle which ruled *Griswold v. Haven*, 25 N. Y. 595 (82 Am. Dec. 380), and cases of that class. As stated in the head-note to that decision, one of a firm of warehousemen falsely represented to a person who advanced money on the faith of the representation, that the one to whom the money was advanced, and to whom he had given receipts in the firm name, had on storage a certain quantity of grain. It was held that where the authority of an agent or partner depends upon some fact outside the terms of his power, and which from its nature rests peculiarly within his knowledge, his principal or firm is bound by his representation, though false, as to the existence of such fact.

The decision in the case cited is controlled by the fact that the representation was made in connection with an act which the partner was authorized to perform, and the fact misrepresented formed part of and was within the power of the

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partner whose representation was relied on. Where a party, dealing with one partner in respect to a matter which corresponds in every particular with the business of the firm, relies upon the representation of the partner as to any fact pertinent to the transaction in hand, which rests peculiarly within the knowledge of the partner, the firm is bound.

Declarations made by an agent or partner in response to timely inquiries relating to matters under his charge, in respect to which it is part of his business in the usual course to act or impart information, bind the principal or firm. *Xenia Bank v. Stewart*, 114 U. S. 224.

It is, however, no part of the business of partners to enlarge, deny or affect the respective interests of members of the firm in the partnership property by declarations or admissions in the absence of each other. They are not constituted agents for each other for any such purpose. The agency extends merely to the conduct of the business of the firm. *Woodruff v. Scaife*, 83 Ala. 152.

It is not to be doubted but that partnership assets may be transferred in payment, or to secure an individual debt of one partner, but this can only be done while the property is in the possession of the owners, and by the consent of all the partners. *Fisher v. Syfers*, 109 Ind. 514; *Carver Gin, etc., Co., v. Bannon*, 85 Tenn. 712 (26 A. L. Reg. 785).

Of course, if one, seeing his property about to be levied on as the property of another, disclaims any ownership therein, or stands by and acquiesces in the sale, he will be estopped to assert a title as against an innocent purchaser. But a disclaimer by one partner can not estop the others, unless it is known to and ratified by them, nor can the acquiescence of one bind the others who had no notice. *Caldwell v. Auger*, 4 Minn. 217 (77 Am. Dec. 515), is not in conflict with this conclusion.

While the answer may have been good, if no other interest than that of Simmons had been involved, since it was not good as an answer to the complaint by Lewis, Simmons &

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Long, as partners, the demurrer was properly sustained. The complaint was sufficient. It was not necessary that the plaintiffs should have tendered the money paid to the constable by Williams. The firm received no benefit from the money. Nor does it make any difference that the plaintiffs had a remedy at law to replevy the property carried away. They have a right to invoke the aid of a court to enjoin the defendant from tearing down their engine and boiler and carrying it away, to the disruption and detriment of their property.

The judgment is affirmed, with costs.

Filed May 29, 1888.

115 51
138 421

No. 13,225.

ALEXANDER v. THE TOWN OF NEW CASTLE.

TOWN.—Negligence.—Excavation in Street.—Proximate Cause of Injury.—Intervening Agency.—Where one, while passing along the street of a town in charge of a prisoner, is seized by the latter, in an attempt to escape, and thrown into a pit negligently permitted by the town authorities to remain in the street, whereby he suffers injury, the town is not liable, its negligence not being the proximate cause of the injury.

SAME.—Instruction to Jury.—An instruction that if the street was in ordinarily safe condition for ordinary public travel, the plaintiff could not recover, the town not being bound to provide against extraordinary conditions or circumstances, is correct as an abstract proposition, and, even if not applicable to the case made, is not harmful to the plaintiff.

From the Henry Circuit Court.

J. M. Brown, R. Warner, C. S. Hernly and S. H. Brown,
for appellant.

J. Brown and W. A. Brown, for appellee.

Alexander v. The Town of New Castle.

NIBLACK, C. J.—This was an action brought by Harvey W. Alexander against the town of New Castle, for injuries alleged to have resulted from negligently permitting a sidewalk to be out of repair.

The first paragraph of the complaint charged that the town allowed a pit to be dug, or an excavation to be made, in the side of one of its streets, and wrongfully and negligently suffered and permitted such pit or excavation, with full knowledge of its dangerous character, to remain open and uninclosed, whereby the plaintiff, without any fault on his part, fell into the same and was injured.

The second, and only other paragraph, contained some additional averments not material to any question involved in this appeal.

The town answered: First. In denial. Second. That one Heavenridge was found upon one of its streets in possession of a gaming apparatus; that the plaintiff engaged with the said Heavenridge in a game of chance for the purpose of procuring evidence against him and causing his arrest; that, thereupon, the plaintiff filed his affidavit before a justice of the peace, charging Heavenridge with gaming, and obtained a warrant for the latter's arrest; that the plaintiff then induced the justice to appoint him a special constable to make the arrest, which he made accordingly; that the justice, after hearing the evidence, adjudged Heavenridge to be guilty as charged, and ordered him to be committed to the jail of the county; that the plaintiff, as such special constable, proceeded to take Heavenridge to jail as ordered, and, in doing so, attempted to pass the pit or excavation in question; that, when opposite the same, Heavenridge seized the plaintiff and threw him into the pit or excavation, whereby he was injured, as charged in the complaint; that by this means Heavenridge was enabled to escape, and did escape, from the custody of the plaintiff.

A demurrer to this second paragraph of answer, for the alleged insufficiency of its facts as a defence, was overruled,

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and a trial terminated in a verdict and judgment for the town, the defendant below.

Complaint is first made of the overruling the demurrer to the second paragraph of the answer, and this complaint is based upon the claim that, as the pit or excavation so wrongfully and negligently permitted to remain open and unclosed afforded Heavenridge the opportunity of throwing the plaintiff into it as a means of escape, it was, in legal contemplation, the proximate cause of the injuries which the plaintiff received.

However negligent a person, or a corporation, may have been in some particular respect, he, or it, is only liable to those who may have been injured by reason of such negligence, and the negligence must have been the proximate cause of the injury sued for.

Where some independent agency has intervened and been the immediate cause of the injury, the party guilty of negligence in the first instance is not responsible. On that subject Wharton, in his work on the Law of Negligence, at section 134, says: "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that casual connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter as to which I am not contractually bound. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I can not be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured. I may be liable to him for my negligence in getting him into difficulty,

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but I am not liable to others for the negligence which he alone was the cause of making operative."

So, if a house has been negligently set on fire, and the fire has spread beyond its natural limits by means of a new agency; for example, if a high wind arose after its ignition, and carried burning brands to a great distance, thus causing a fire and a loss of property at a place which would have been safe but for the wind, the loss so caused by the wind will be set down as a remote consequence, for which the person setting the fire should not be held responsible. 1 Thompson Negligence, 144.

Our cases are in harmony with the general principles herein announced. *Smith v. Thomas*, 23 Ind. 69; *Pennsylvania Co. v. Hensil*, 70 Ind. 569 (36 Am. R. 188); *City of Greencastle v. Martin*, 74 Ind. 449 (39 Am. R. 93); *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166 (40 Am. R. 230); *City of Crawfordsville v. Smith*, 79 Ind. 308 (41 Am. R. 612); *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346 (49 Am. R. 168); *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478 (49 Am. R. 469); *Pennsylvania Co. v. Whitlock*, 99 Ind. 16 (50 Am. R. 71).

Heavenridge was clearly an intervening, as well as an independent, human agency in the infliction of the injuries of which the plaintiff complained. The circuit court, consequently, did not err in overruling the demurrer to the second paragraph of the answer.

The circuit court gave the jury several instructions, one of which was as follows:

"If the sidewalk and street named in the complaint were in ordinarily safe condition for ordinary public travel, the plaintiff can not recover, the town not being bound to provide against extraordinary conditions or circumstances of travel or passage along its streets or sidewalks."

As an abstract proposition this instruction stated the law correctly. 2 Dillon Munic. Corp., section 1006.

However inapplicable, therefore, it may have been to the

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controlling facts or the distinctive features of the present case, the plaintiff had no cause to complain of it as an erroneous instruction.

A question is sought to be made upon the sufficiency of the evidence to support the verdict, but no failure in that respect has been specifically pointed out. There was evidence tending to sustain the defence set up by the second paragraph of the answer. We can not, therefore, rightly disturb the verdict upon the evidence. 2 Dillon Munic. Corp., section 1007.

The judgment is affirmed, with costs.

Filed May 29, 1888.

No. 13,345.

BRITTON v. THE STATE, EX REL. ROWE.

GUARDIAN AND WARD.—*Bond.—Liability Where no Penalty is Expressed.—*

Surety.—Under section 2516, R. S. 1881, a guardian's bond is valid and enforceable, even as against a surety, although no penalty is expressed therein, and a recovery may be had for all losses resulting from any breach of the guardian's duty.

SAME.—*Infant Relator.—Poor Person.—Next Friend.*—Under section 260, R. S. 1881, an infant relator, without means, may be admitted to prosecute an action upon a guardian's bond as a poor person, and without the procurement of a next friend to appear therein, as required by section 256.

SAME.—*Non est Factum.—Admission of Bond in Evidence.*—Although a defendant denies under oath the execution of a bond in suit, and claims that it was delivered without authority, yet if his signature is admitted to be genuine, and it appears that the bond was taken, approved and filed by the clerk many years prior to the action, its admission in evidence is authorized.

115	55
146	373
115	55
150	70

Britton v. The State, *ex rel.* Rowe.

EVIDENCE.—*Exclusion When Improperly Offered on Cross-Examination.*—*Error.*—*Practice.*—No available error can be predicated upon the exclusion of evidence improperly offered on cross-examination.

From the Montgomery Circuit Court.

W. H. Thompson, J. West and W. B. Herod, for appellant.
M. E. Clodfelter and T. E. Ballard, for appellee.

HOWK, J.—This is the second appeal to this court in this case. On the former appeal herein, the opinion and judgment of the court are reported under the title of *State, ex rel., v. Britton*, 102 Ind. 214. We then held that, in the first paragraph of her complaint herein, plaintiff's relatrix, Mary L. Rowe, stated a cause of action amply sufficient to withstand defendant's demurrer thereto for the alleged insufficiency of the facts therein to constitute a cause of action. After the cause was remanded to the court below, defendant's demurrer to the first paragraph of complaint was overruled, in obedience to the mandate of this court. Defendant then answered in three paragraphs, of which the first stated a special defence, the second was a general denial of the first paragraph of complaint, and in the third paragraph of his answer he denied under oath his execution of the bond in suit. Relatrix replied by a general denial of the first paragraph of answer. The issues joined were tried by a jury, and a verdict was returned for plaintiff's relatrix, assessing her damages in the sum of \$200; and, over defendant's motion for a new trial, the court rendered judgment on the verdict.

In this court, the only error assigned by defendant, Britton, is predicated upon the overruling of his motion for a new trial.

Plaintiff's relatrix sued herein upon a guardian's bond, alleged to have been executed by one Edward G. Rowe, as guardian of the persons and property of relatrix and others, minor heirs of Mary Rowe, deceased, and defendant Britton, as his surety therein. This bond is set out at length in our

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opinion on the former appeal. It was imperfect, in that the obligors therein were "bound unto the State of Indiana in the sum of ——— dollars," and was conditioned that "if the above bound Edward G. Rowe will faithfully discharge his duties as guardian of the persons and property of Henry Rowe, Mary L. Rowe, * * * minor heirs of Mary Rowe, deceased, then the above obligation is to be void, else to remain in force." In section 2516, R. S. 1881, in force since May 6th, 1853, it is provided as follows: "Such guardian's bond shall not be void on account of any informality, illegality, or defect, either formal or substantial, in the same; nor on account of any defect, informality, or illegality in the appointment of such guardian; but shall have the same force and effect as if such appointment had been legally made and such bond legally executed." In view of the provisions of this section of the statute, "touching the relation of guardian and ward," we held on the former appeal herein that a guardian's bond is valid and enforceable, even as against a surety therein, although no penalty whatever is expressed in such bond. In the opinion of the court, on the former appeal herein, after quoting such section of the statute, it is said: "This statute is as broad and comprehensive as it was possible for the Legislature to make it, and it makes all bonds effective, no matter what omissions are found to exist. It holds sureties liable for the faithful discharge of the duties of the guardian, and makes them responsible for losses arising from a breach of duty. The omission of the penalty does not invalidate the bond; notwithstanding its omission, the bond still holds the surety responsible for the acts of the guardian. The failure to prescribe the penalty leaves the surety's liability to be ascertained by determining the duty of the guardian and the loss resulting from the failure to perform it. The failure to name the penalty does not avoid the bond; it simply leaves the measurement of the recovery to be ascertained by finding the loss resulting from the failure to perform the duties enjoined by law."

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We have quoted thus liberally from our opinion on the former appeal herein for the purpose of showing that a guardian's bond, however defective it may be, is rendered valid and binding on both principal and surety by force of the provisions of section 2516, above quoted, for all losses resulting from any breach of the guardian's duty.

We proceed now to the consideration of the alleged errors of law occurring at the trial, of which defendant's learned counsel complain in their exhaustive brief of this cause.

It is shown by a bill of exceptions properly in the record that, while the relatrix was introducing her evidence in chief on the trial, she "admitted in open court, and before the jury empanelled to try said cause, that she was not twenty-one years of age." Thereupon, the defendant moved the court to dismiss this cause, on the ground that relatrix was a minor, and a minor could not be a relatrix, which motion was overruled by the court, and defendant excepted. Defendant then asked leave of the court to file an additional paragraph of answer, showing the minority of relatrix, and that the fact was unknown to him and his counsel until after the trial had begun; but such leave was refused by the court, and defendant excepted. Defendant then moved the court to require that relatrix should prosecute this suit by a responsible person appearing as her next friend, which motion was overruled by the court, and defendant excepted. These three rulings of the trial court relate to the same subject and present the same questions, and may be properly considered together.

It is manifest that each of these motions of defendant is founded upon the provisions of section 256, R. S. 1881, and the construction placed thereon by his counsel. In that section it is provided as follows: "Before any process shall be issued in the name of an infant who is a sole plaintiff, a competent and responsible person shall consent in writing to appear as the next friend of such infant; and such next friend shall be responsible for the costs of such action; and thereupon process shall issue as in other cases," etc.

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Although this action was commenced, and properly so, in the name of the State of Indiana as plaintiff, yet the relatrix, Mary L. Rowe, was without doubt the real plaintiff herein; and if it were true, as claimed by defendant's counsel, that, under the provisions of section 256, above quoted, an infant, under the age of twenty-one years, could not be a relator in an action on a penal bond, payable to the State, under which he or she was a beneficiary, the sole reason therefor would be that he or she could not be a sole plaintiff in such an action unless and until a competent and responsible person should consent in writing to appear as his or her next friend therein. If the section quoted contained all the provisions of our civil code which had any bearing upon the rulings under consideration, there would be some grounds for defendant's contention that the court below had erred in those rulings. But there are other provisions of our civil code which, we think, strongly support the rulings of the trial court of which defendant complains.

Thus, in section 255, R. S. 1881, it is provided as follows: "When an infant shall have a right of action, such infant shall be entitled to bring suit thereon, and the same shall not be delayed or deferred on account of such infant not being of full age."

From the facts stated in the complaint of the relatrix herein, sustained as they were by the evidence in the record, she had a clear right of action against the defendant, which, under the statute, was not to be "delayed or deferred" on account of her not being of full age. It may be said, however, that there is nothing in the section last quoted which would excuse or prevent the relatrix herein from complying with the requirements of section 256, *supra*, by procuring the written consent of a competent and responsible person to appear in this action as her next friend. This is true, no doubt, as a general rule, but not, we think, as applied to this case as shown by the record thereof. It appears from the record that long before the trial of this cause, and before the

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former appeal thereof to this court, upon a proper showing made by the relatrix, to the satisfaction of the court below, that she was a poor person, without sufficient means to prosecute this action, it was ordered by such court that she should be admitted to prosecute her suit herein as a poor person, and the court assigned her counsel to prosecute her cause, and required the officers of the court to do their duty in the case "without taking any fee or reward therefor from such poor person." This action of the court below was had under and pursuant to, and in strict conformity with, the provisions of section 260, R. S. 1881. In view of this action of the court, it can not be held that the court below erred in any of the rulings which we are now considering, or in refusing to require the relatrix to procure the written consent of a competent and responsible person to appear as her next friend herein. It would have entirely defeated the purpose of section 260, *supra*, and rendered nugatory the order of the trial court, pursuant thereto, admitting relatrix to prosecute this action as a poor person, if she had been required by the court to procure a competent and responsible person to appear as her next friend in the prosecution of this suit; for the provision of section 256, *supra*, is mandatory, which declares that "such next friend shall be responsible for the costs of such action."

In *Hood v. Pearson*, 67 Ind. 368, it was held by this court in a carefully considered opinion, that, construing together the provisions of sections 256 and 260, *supra*, an infant plaintiff has the right, upon showing to the satisfaction of the proper court that he is a "poor person, not having sufficient means to prosecute his action," to be admitted by the court to prosecute the action "as a poor person," without the procurement of a next friend to appear therein. The case cited was approved and followed, upon the points under consideration, in *Wright v. McLarin*, 92 Ind. 103, and we still adhere to it in the case at bar.

2. Defendant's counsel next insist very earnestly that the

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court below erred in admitting the bond sued upon in evidence, without sufficient proof first made of his execution of such bond. This point is not well taken, and can not be sustained. Defendant admitted that his genuine signature was attached to the bond in suit, and his only contention was that he had never delivered such bond, nor authorized its delivery, to the clerk of the court below. It appeared from the bond itself that it had been taken, approved and filed by such clerk more than twelve years before the trial of this cause. Although defendant had denied under oath his execution of the bond sued upon, yet the evidence before the court, we think, fully authorized the admission of such bond in evidence.

3. Finally, it is claimed on behalf of defendant that the court below erred in excluding evidence tending to prove that, at the time he signed the bond in suit, he ordered the clerk of such court not to accept the bond, without another surety thereon, and that the clerk refused to accept such bond. Manifestly, this evidence was offered by defendant in support of his plea of *non est factum*, and for no other purpose. But it is shown by the record that defendant offered such evidence on his cross-examination of a witness introduced by relatrix in support of her cause of action. The evidence offered was not competent or legitimate, strictly speaking, on cross-examination; and we may well suppose that it was on this ground such evidence was excluded by the learned judge of the trial court. *Cincinnati, etc., R. W. Co. v. Lutes*, 112 Ind. 276, 284.

Defendant's motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

Filed May 29, 1888.

Heuston v. Simpson *et al.*

No. 13,176.

HEUSTON v. SIMPSON ET AL.

EVIDENCE.—*Physician and Patient.*—*Knowledge Acquired in Discharge of Professional Duty.*—*Will.*—*Action to Set Aside.*—In an action to set aside a will, it is not competent, if objection be made, for a physician who attended the testator in his last illness to testify as to his mental and physical condition, from knowledge acquired by him while in the discharge of professional duty. Section 497, R. S. 1881.

From the Lawrence Circuit Court.

F. L. Prow, G. W. Friedley and J. Giles, for appellant.

M. F. Dunn, G. G. Dunn, W. H. Edwards and T. Huston, for appellees.

ELLIOTT, J.—This action was brought by the appellant to set aside the will of his deceased brother, David Heuston.

The executor and devisees were made defendants.

On the trial two of the physicians who attended the testator in his last illness were called as witnesses, and the appellant proposed to prove by them the mental and physical condition of the testator. The appellees objected, on the ground that an attending physician can not testify as to the result of an examination made by him in a professional capacity, nor as to any facts observed or learned by him while acting in that capacity. The objection prevailed.

Appellees defend the ruling of the trial court upon the authority of section 497, R. S. 1881, and the case of *Masonic Mut. Ben. Ass'n v. Beck*, 77 Ind. 203 (40 Am. R. 295). In that case the court quoted with approval from the case of *Edington v. Mutual Life Ins. Co.*, 5 Hun, 1, this language: "The secrets of the sick chamber can not be revealed, because the patient was too sick to talk, or was temporarily deprived of his faculties by delirium or fever, or any other disease, or because the physician asked no questions. The statute seals the lips of the physician against divulging in a court of jus-

115	62
123	421
115	62
135	442
115	62
142	201
115	62
154	34
156	538

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tice the intelligence which he acquired while in the necessary discharge of his professional duty." The last sentence in the extract we have made from *Edington v. Mutual Life Ins. Co.*, *supra*, correctly declares the law.

If the knowledge is acquired in the chamber of the patient, and in the discharge of professional duty, the physician can make no disclosure. This is true, whether the knowledge is communicated by the words of the patient, or is gained by observation, or is the result of a professional examination. The law forbids the physician from disclosing what he learns in the sick-room, no matter by what method he acquires his knowledge. *Masonic Mut. Ben. Ass'n v. Beck*, *supra*; *Excelsior Mut. Aid Ass'n v. Riddle*, 91 Ind. 84; *Penn Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92 (50 Am. R. 769); *Carthage T. P. Co. v. Andrews*, 102 Ind. 138 (52 Am. R. 653); *Williams v. Johnson*, 112 Ind. 273; Rapalje Law of Witnesses, section 272.

The rule we have stated is a general one, for the statute makes no exceptions. It is a rule that may be invoked by the representatives of the deceased patient. It must, therefore, apply to this case unless the court legislates, and, by legislation, creates an exception. That we can not do. The case before us is within the rule, and must be decided as the rule requires.

The question came before the court in *Renihan v. Dennin*, 103 N. Y. 573, as it comes before us, in an action to set aside a will, and it was held, all the judges concurring, that the testimony was incompetent.

The case of *Coryell v. Stone*, 62 Ind. 307, is not in point. There was no such question in that case as we have in this, for there was no attempt in that case to secure a disclosure of knowledge acquired by a physician in his professional capacity.

In *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433, no question was made as to the competency of the witnesses, nor was any such question made in *Dyer v. Dyer*, 87 Ind. 13, so

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that neither of these cases lends any support to the appellants' position.

The instructions, taken, as they must be, as an entirety, correctly stated the law to the jury.

Judgment affirmed.

Filed May 29, 1888.

No. 12,624.

THE BOARD OF COMMISSIONERS OF HAMILTON COUNTY ET
AL. v. THE STATE, EX REL. COTTINGHAM ET AL.

RAILROAD.—*Township Aid.*—*Taking Stock.*—*Mandate to Compel Collection of Special Tax.*—*Mortgage.*—*Foreclosure and Sale.*—Under the act of 1869 (Acts 1869, Spec. Sess., p. 92) a township, upon a proper petition, voted to aid a named railroad company in constructing a railroad by taking the stock of such company to a certain amount. A special tax was levied in 1872 for one-half of the amount appropriated, and the money thus raised was paid to the company, it having done work to that amount in the township. The next year a levy was made to raise the balance of the appropriation, but it has never been placed upon the tax duplicate for collection. In 1875, and before the completion of the road, the company mortgaged all its property and franchises, became insolvent, and ceased work upon the road. At a sale under a foreclosure of the mortgage, all the property and franchises covered by the mortgage were conveyed to a new and independent corporation, sustaining no relation to the old company. The new company has completed the road through the township. It has neither issued nor offered to issue any capital stock to the township, but seeks by mandate to compel the collection of the second half of the taxes levied in behalf of the old company.

Held, that no right to the appropriation passed to the new company by the mortgage and foreclosure proceedings, and it is not entitled to the money voted to the old company, and can not enforce the collection of the taxes, as it can neither demand the appropriation as a donation nor in return for stock other than that of the company to aid which the appropriation was made.

115	64
162	601
162	602

115	64
e166	184
e166	185

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SAME.—*Aid by Way of Donations and Taking Stock.—Statutory Distinction.*—

The statutes of this State create a distinction between appropriations by townships, by way of donations to railroad companies, and by way of taking stock therein; and the people to be taxed have a right to determine in advance, and to impose a condition, that the amount appropriated shall be by way of taking stock; when this has been done, the money can not be demanded by the railroad company as a donation.

SAME.—*Appropriation a Contract.*—An appropriation by a township by way of taking stock in a railroad company, when within the authority given by the statutes and when the subscription is made, will be considered as a contract, just as a subscription for stock in such company by an individual is a contract, and the township is entitled to the same protection as a private subscriber.

SAME.—*Subscription to Stock.—How Made.*—Under the act of 1869, concerning aid to railroads, the simple voting of aid by a township is not a subscription to the stock of the railroad company, but the subscription is to be made by the board of county commissioners, which, for that purpose, acts as the agent of the township, and until the board exercises such power there is no perfected or enforceable subscription.

SAME.—*When Appropriation Becomes a Chose in Action.*—Until the railroad company to which aid has been voted occupies a position which will enable it to enforce whatever right or interest it may have in the appropriation, such appropriation is not a chose in action in its favor which it can assign or mortgage.

SAME.—*Sale of Railroad Under Foreclosure.—Release of Subscribers to Stock.*—Under the act of 1865 (Acts 1865, Reg. Sess., p. 66; R. S. 1881, section 3947, *et seq.*), relating to the sale of railroads and the formation of new corporations, all subscriptions to the stock of a railroad company whose property has been sold under foreclosure proceedings are discharged, unless there has been a previous adjustment, and such act of 1865 is applicable to subscribers who have become such under subsequent statutes.

From the Hamilton Circuit Court.

A. F. Shirts, G. Shirts, W. R. Fertig, W. S. Christian, I. W. Christian, J. Stafford, T. E. Boyd, T. E. Ballard, E. E. Ballard, P. S. Kennedy, S. C. Kennedy, J. H. Burford and W. T. Whittington, for appellants.

H. Crawford, T. J. Kane and T. P. Davis, for appellees.

ZOLLARS, J.—The Midland Railway Company, an appellee in this action, claims to be the successor of the Anderson, Lebanon and St. Louis Railroad Company, and as such en-

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titled to an appropriation voted in aid of the latter company by Noblesville township, in Hamilton county. The whole of the amount so voted has not been placed upon the tax duplicate for collection. Appellee Cottingham, and the Midland Railway Company, as relators, filed a complaint in the court below against the board of commissioners of Hamilton county, and James W. Crooks, as the auditor of that county, in which they asked that, by a writ of mandate, Crooks should be compelled to place the amount upon the tax duplicate for collection, and that the county board should be compelled to make an order for its collection. An alternative writ of mandate was issued and served, and to that writ appellants made return. A demurrer was sustained to the return, and a peremptory writ ordered.

Passing over the question as to whether or not, in a case like this, the railway company may be a relator, and other questions which do not go to the merits of the real controversy, we direct our attention to the return by appellants, as that does present the controlling question in issue.

The following summary embodies such portion of the facts averred in the return as needs to be here set out: In 1871, a proper petition was presented to the board of commissioners of Hamilton county, asking that Noblesville township should appropriate \$28,500 to aid the Anderson, Lebanon and St. Louis Railroad Company in constructing a railroad through the township, by taking stock in that company. In accordance with the petition, an election was ordered and held, and the amount voted for the purpose of taking stock in the railroad company. At its June session, 1872, the county board granted the prayer of the petition, and levied a special tax upon the property in the township to raise one-half of the amount appropriated. At its June session, 1873, the county board levied a special tax to raise the balance of the amount appropriated. The tax was ordered for the purpose of aiding the railroad company by taking stock therein.

The amount of the first levy was collected, and the rail-

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road company having done work equal to that amount upon its line in the township, the money was paid over to it, and the township received stock in return.

The second levy has not been placed upon the tax duplicate for collection.

In 1875, and before the company had completed the construction of its road through the township, it executed a mortgage upon its franchises, rights, titles, privileges and immunities, and upon all of its property real and personal, and choses in action of every description, to two persons, as trustees for its bondholders. In 1878, suit was commenced in the circuit court of the United States for the District of Indiana, to foreclose the mortgage. A decree of foreclosure was rendered by that court in 1883. In 1885, W. P. Fishback, master in chancery, by order of the court, sold all of the property covered by the mortgage. It was purchased by Thomas C. Platt, as trustee of the bondholders. The sale was confirmed by the court, and the master in chancery was ordered to, and did, convey the property to appellee, the Midland Railway Company, a corporation organized by the purchaser and his associates for the express purpose of taking, in its own name, the title to the property so sold and purchased.

Immediately after executing the mortgage, the Anderson, Lebanon and St. Louis Railroad Company became and remains insolvent, and ceased work upon its road. After the purchase the Midland Railway Company took possession of the property, and, at the time this action was commenced, had so far completed the construction of the road through the township that construction trains might pass over it, but it is not in a condition for passenger and freight traffic.

The Midland Railway Company is a new and independent corporation, sustaining no relation to the old company. It has not issued nor provided for the issuing of any capital stock to Noblesville township on account of the taxes sought

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to be collected, nor has it made, or offered to make, any adjustment in relation to stock.

Upon the facts so set up in the return, we think it clear that the Midland Railway Company is not entitled to the money voted to the old company, and hence has no interest in the collection of the taxes. There is a clear distinction between appropriations by townships, by way of donations, and by way of taking stock in the company. The appropriation in controversy was voted under the act of 1869 (Acts 1869, Spec. Sess., p. 92, *et seq.*). That act, as all subsequent acts and amendments, recognizes the distinction. The first section of that act provided that, when a petition was presented to the county board, asking that a township should make an appropriation by "taking stock in or donating money to a railroad company," etc., it should be the duty of the board, etc. See, also, section 14 of the same act; also, Acts 1873, p. 185, section 2; Acts 1875, Reg. Sess., p. 121; Acts 1877, Reg. Sess., p. 111; Acts 1879, p. 46; R. S. 1881, sections 4045, 4058, 4069, 4070.

The people to be taxed have a right to determine in advance, and, by their petition to the county board and by their vote, to impose a condition, that the amount appropriated shall be by way of taking stock in the railway company. And when they have thus imposed the condition the money voted can not be bestowed upon, nor successfully demanded by, the railway company as a donation. *Faris v. Reynolds*, 70 Ind. 359; *Bittinger v. Bell*, 65 Ind. 445; *Irwin v. Lowe*, 89 Ind. 540; *Brokaw v. Board, etc.*, 73 Ind. 543; 1 Rorer Railroads, 125; 1 Wood Railway Law, 306, section 119.

The people of the township might be willing to vote money to be invested in the stock of the railroad company, and entirely unwilling to vote it as a donation. The stock represents the property of the corporation. The township, as a holder of it, would be entitled to vote in the meetings of the stockholders, and would thus, to some extent, have a voice in the government of the corporation and in the management of its property.

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In the case in hearing the amount was not only voted to be invested in stock, but it was voted to be invested in the stock of the Anderson, Lebanon and St. Louis Railroad Company. No one has a right to demand the money without giving the stock of that company in return. The Midland Railway Company has no right to demand the money as a donation. It can not demand the money in return for stock, because it has no power to issue the stock of the Anderson, Lebanon and St. Louis Railroad Company; and it can not give its own stock in return, because neither the township nor the taxpayers thereof have agreed to receive its stock in lieu of the stock of the old company. They can not be coerced into such an agreement. To hold otherwise would be to hold that, although the township voted the money for one purpose, it may be taken and appropriated to an entirely different purpose. It may be observed, too, that the Midland Railway Company does not offer, nor has it proposed to offer, its own stock in return for the money.

For the reasons above stated, it must be held that the right to the money voted by the township did not and could not so pass to the Midland Railway Company, by the mortgage and foreclosure proceedings, as that it can recover it from the county or township, or demand that the tax shall be placed upon the duplicate and collected. The Midland company has no right in or to the appropriation that it can in any way enforce, because to accord it any such right would be to impose an obligation upon the township that it never in any way assumed, and to take its money without returning that for which it was voted.

This case is altogether different from the cases of *Scott v. Hansheer*, 94 Ind. 1, *Jussen v. Board, etc.*, 95 Ind. 567, and *Board, etc., v. Center Township*, 105 Ind. 422. In those cases the appropriations were in the way of money donations. In such cases, the purpose of, and the consideration for, the donation is the building of the railroad through the township. In such cases, neither the township

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nor the taxpayer has any interest in the corporation or its property; nor do they, by the donation, directly or indirectly contract for any such interest. When the railroad is built through the township, whether by the original company, or by another company that has succeeded to its rights, the whole purpose of the donation is accomplished. Not so here. Had the original company continued to be the owner of the road, and completed its construction, the township, by the payment of the amount voted and yet unpaid, would have been entitled to the amount in the stock of the company, and thus, as we have said, would have been a part owner of the corporate property, interested in the corporation, and entitled to a voice in the management of its affairs. Having reached the conclusion we have, it is not necessary for us to examine, critically, as to whether or not the mortgage was so specific in description as to cover the uncollected appropriation. As it does not appear, by anything shown in this case, that there is any person or railway company entitled to demand and receive the money, should it be collected, the court will not lend its aid to accomplish a useless ceremony and impose a useless and unjust burden upon the taxpayers of the township by ordering the tax to be placed upon the duplicate and collected.

The judgment is reversed, at the costs of appellees, and the cause remanded, with instructions to the court below to overrule the demurrer to appellant's return to the alternative writ.

Filed Jan. 30, 1886.

ON PETITION FOR A REHEARING.

ZOLLARS, J.—Counsel for appellees contend, with vigor and ability, that in this State, as elsewhere, there is no difference between an appropriation by a municipality by way of a donation and by way of taking stock in the railway company to which aid is voted.

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That our statutes clearly recognize and create such a distinction is, in our judgment, so plain as to leave no reasonable ground for controversy.

The first section of the act of 1869 (Acts 1869, Spec. Sess., p. 92, *et seq.*), as stated in the principal opinion, provided that when a petition was presented to the county board, asking that a township should make an appropriation by *taking stock in, or donating money to, a railway company, etc.*, it should be the duty of the board, etc.

The 14th section of the act provided that, after any part of the assessment should be collected, the board of commissioners might *take stock in the railway company* from time to time, in the name of the proper township, and pay therefor when the same was taken, etc. The title of the act was "An act to authorize aid to the construction of railroads by counties and townships *taking stock in, and making donations to, railroad companies.*"

Section 1 of the act of 1872, which seems to be in force yet (R. S. 1881, section 4065), provides that in all cases where a township tax has been levied and collected under the act of 1869, which authorizes townships, by *taking stock in, or making donations to, railway companies, to aid in their construction, and the right to the tax has been forfeited, the money shall revert, etc.*

Another act of 1872 (R. S. 1881, section 4070) had relation solely to *stock in railroad companies, issued for aid voted by counties and townships.*

Section 6 of the act (section 4075, R. S. 1881) clothes the township trustee with authority to vote the *stock held by the township, in all meetings of the stockholders of the railway companies by which the stock may be issued.*

And still another act of 1872 (Acts 1872, p. 49, Spec. Sess. ; R. S. 1881, section 4077, *et seq.*) has relation alone to stock in railroad companies, issued for aid voted by municipalities.

The title of the act of 1873 was "An act supplemental to 'An act to authorize aid * * by townships *taking stock in, and*

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making donations to, railroad companies,' " etc. Acts 1873, p. 184.

The 1st section of the act provides (R. S. 1881, section 4068) that no tax shall be placed upon the duplicate of any county for the purpose of *taking stock or making donations* to railroad companies, etc., until the railroad shall be permanently located in the township, etc.

The 2d section of the act provided that, where *stock was taken or donations made by any township*, the collection of the tax should be suspended until the railway company had expended in the township in the construction of its road an amount equal to the amount of *money to be donated or stock taken*.

The same distinction between taking stock in, and making donations to, railway companies by municipalities is made in the amendatory act of 1875. Acts 1875, p. 121; R. S. 1881, section 4069. And so in the act of 1877. Acts 1877, p. 111, Reg. Sess.

The act of 1879 also provided that townships might vote aid to railway companies by *taking stock in, and donating money to*, such companies, etc. Acts 1879, p. 46.

Section 3 of the act provides that no township, which shall become the owner or holder of any *stock* in any railroad company, shall become liable for any debt or claim for work, labor or material incurred in the building of the road, etc. R. S. 1881, section 4064.

We have thus extended our references to the several statutes, not for the purpose of placing a construction upon them generally, nor of determining which, or what portion of each, is now in force, but for the purpose of showing by quoting some of the language of each, in substance, that they all not only very clearly recognize, but as clearly establish, a difference between aid to railway companies by municipalities by way of taking stock, and by way of donations. To say that they do not recognize and estab-

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lish such a distinction, would be to convict the Legislature of the most useless and meaningless tautology.

Our cases have always recognized and enforced the distinction thus established by the statutes. For example, in the case of *Faris v. Reynolds*, 70 Ind. 359, cited in the principal opinion, the petition by the taxpayers to the county board was, that a tax might be levied upon the property of the township to be collected and invested in the stock of the railway company. It was held that, under the statutes, the taxpayers of the township might determine by their petition, and by their votes, whether the aid voted should be by way of taking stock in the railway company, or by way of donation. Amongst other things, it was said: "The people of a township, who vote this tax upon themselves, should have the right, and, we think, have the right under the law, to determine by their vote the manner in which the money shall be used, whether by donation of the money or by taking stock in the company."

In the case of *Bittinger v. Bell*, 65 Ind. 445 (458), cited in the principal opinion, the difference between aid to a railway company by way of a donation, and by way of taking stock therein, is fully recognized and asserted. And so, in the case of *Indiana, etc., R. W. Co. v. City of Attica*, 56 Ind. 476, which arose under a statute similar to those involved here, so far as concerns the point under discussion, it was held that there is a clear and material difference between aid to railway companies by municipalities by way of a donation, and by way of taking stock in such companies.

In the case of *Board, etc., v. Indianapolis, etc., R. W. Co.*, 89 Ind. 101, it was held that the difference between an appropriation to a railway company, under the statutes above referred to, by way of a donation and by way of taking stock, is so marked, that section 18 of the act of 1869, providing for a forfeiture of the right to an appropriation voted, applied only to donations, and not to cases where the appropriation was by way of taking stock in the company.

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We held in the principal opinion that the people to be taxed have a right to determine in advance, by their petition to the county board, and by their votes, that the appropriation shall be by way of taking stock in the railway company, and that, when they have thus determined, the amount can not be recovered as a donation by the railway company, nor by its successor, by whatever means or method there may be a successor. To that conclusion we adhere with much confidence in its correctness.

We yield our assent to the proposition, that where an appropriation has been lawfully made and completed, and a subscription for stock has been made in the manner provided by the statutes, such appropriation and subscription become a binding obligation upon the township. But it will not do to say that the township can be bound by an obligation which it has in no legal way assumed. In other words, the township can not be compelled to make a donation of the amount voted, where, as here, it has been voted upon the condition that the township shall receive therefor an equal amount of stock in the railway company. The township will be held to the terms of the appropriation, as expressed by the petition to the county board, by the vote of the people and by the final order of the board, and so, also, will the railway company.

The railway company must accept the appropriation as tendered by such petition, vote and order, or not at all. If the people have thus declared that the appropriation shall be by way of taking stock in the railway company, they have a right to the stock in return for the appropriation, and the railway company can no more coerce the payment of the money without the stock than can the township demand the stock without the payment of the money.

To hold otherwise would be to abolish all distinction between an appropriation by way of donation and by way of taking stock, which is so clearly established and recognized by our statutes and the cases, and to hold that, while the

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township may prescribe conditions, it is powerless to have them respected by the railway company. In short, it would be to hold, as before stated, that the township may be held by an obligation which it has in no way assumed.

There is no reason why an appropriation by a township by way of taking stock in a railway company, when within the authority given by the statutes, and when the subscription is made, should not be considered a contract, just as a subscription for stock in such company by an individual is a contract. And, clearly, the township is entitled to all the protection that will be awarded to a private subscriber. The protection is not to be less because the people, in the aggregate, are concerned. Cook Law of Stock and Stockholders, section 99; *Shipley v. City of Terre Haute*, 74 Ind. 297; *City of Buffalo v. Bettinger*, 76 N. Y. 393; *Gray v. State, ex rel.*, 72 Ind. 567 (580); *People v. Dutcher*, 56 Ill. 144.

Mr. Cook, in his work above referred to, at section 100, states the following, which is sustained by reason and by the cases: "Under the same circumstances and conditions, and to the same extent as any other subscriber, a municipal corporation may compel a railway or other corporation to deliver to it stock to which the subscribers in general are entitled. It is entitled, like any other subscriber, to whatever it has subscribed for and paid for. Whatever would prevent an individual subscriber from enforcing such delivery will equally prevent a municipality in a like case. So it is said that a municipal corporation, or a subscriber, is in no better position than an individual subscriber in this respect. The cases plainly make no distinction as to the right to enforce delivery of stock between classes of subscribers, and the municipal subscriber has no more and no less right in respect thereto than other subscribers." To the same effect, see 1 Wood Railway Law, section 118.

The foregoing is, doubtless, the general rule applicable in all cases, unless in some way varied or modified by the stat-

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utes authorizing the municipal aid. It is not modified or varied by our statutes.

It may be conceded, as contended by counsel for appellee, that it is not shown by the record that the Anderson, Lebanon and St. Louis Railroad Company has not been dissolved by a decree of a court. It may be, therefore, that that corporation still has a legal existence; but while the pleadings are not very definite upon that subject, we think that it is made evident by the record that abundant causes for such a forfeiture exist, and all that is necessary to end the existence of the practically defunct corporation is the judgment of a court. See 2 Wood Railway Law, p. 1171, *et seq.*; R. S. 1881, section 3930.

Undoubtedly, the purpose of the people of the township in voting the appropriation by way of taking stock, instead of by way of a donation, was to acquire such an interest in the corporate property as shares of stock represent, and such an interest and voice in the management of that property and the company's affairs as appertain to stockholders in such corporations. Stock in a railway company is property which a municipality may sell. *Shannon v. O'Boyle*, 51 Ind. 565; *O'Boyle v. Shannon*, 80 Ind. 159.

After the appropriation was voted, and after one-half of the amount had been collected and paid to the railroad company for a like amount of its stock, and before the remaining one-half had been collected, or placed upon the tax duplicate for collection, the Anderson, Lebanon and St. Louis Railroad Company abandoned the enterprise by an indirect alienation of all of its franchises, privileges, rights and property of every description, and, since the sale under the decree of foreclosure, has owned nothing of value to be represented by shares of stock. For all practical and beneficial purposes, so far as concerns Noblesville township, that railroad company ceased to exist with the sale of all its franchises, privileges, rights and property.

Possibly, that company still has such an existence that, if

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there is no statute in the way, it might collect unpaid subscriptions for stock for the purpose of paying its debts, if it owes any which are yet binding obligations. Possibly, a receiver might be appointed for it who, if there is no statute in the way, would have power to collect enough of the unpaid subscriptions for stock to pay its debts, if it owes any which are still binding obligations. Possibly, too, for the payment of the debts of that corporation, if it owes any which are yet binding obligations, and if there is no statute in the way, the collection of the tax in question here might in some way be coerced.

These are questions which we need not and do not decide, because they are not before us for decision. This is not an action by the Anderson, Lebanon and St. Louis Railroad Company, nor is it an action by a receiver appointed to close up its affairs. Nor is it an action by any one for the purpose of collecting assets with which to pay debts of that company. Although it is alleged that Cottingham, who joined with the Midland Railway Company as a relator, is a taxpayer of the township, the purpose of the action is very plain. It is in no sense an action by, in behalf of, or for the benefit of the Anderson, Lebanon and St. Louis Railroad Company, or its general creditors.

The action is the first step by the Midland Railway Company in its endeavor to compel the placing of the tax upon the duplicate; to compel the collection of the tax and the payment of the amount collected over to it, and leave the township and the taxpayers to hunt up and deal with the Anderson, Lebanon and St. Louis Railroad Company, and protect themselves as best they can.

It is averred in the return to the alternative writ, as stated in the principal opinion, that the mortgage, which finally swept away all of the property of that company, was executed in 1875. It is further shown in that return, that, after the execution of the mortgage, that company abandoned all work upon the road, and the property passed into the hands

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of a receiver. Since then that company has had no property nor interest, so far as shown, which would require it to keep up its directory, or elect officers, or which would, in any way, interest it in doing so. So far as shown, it has no office in this State for the transaction of business, nor for any other purpose. It may yet have a bare legal existence, but it is evident that it would require more than an ordinarily skilful officer to find any representative of the company upon whom a writ might be properly served.

To say that the township or the taxpayers must first pay to the Midland Railway Company, and then look to the old company for its stock, is, for all practical purposes, to say that the money must be paid without the stock for which it was voted.

It must be apparent, that if the Midland Railway Company shall succeed in its purpose to have the money collected and paid over to it, the township and the taxpayers will be left without anything in return for the amount paid, and without any sort of protection. Such a result is not to be allowed, unless imperatively required by settled rules of the law. Clearly, prior rulings will not be extended for the purpose of accomplishing such a result. On the contrary, those rulings should be, and will be, limited to the cases before the court in which they were made.

As we have stated, one-half of the amount voted was placed upon the duplicate and collected, and the amount paid over to the Anderson, Lebanon and St. Louis Railroad Company in return for a like amount of its stock. While the county treasurer was engaged in the collection of that portion of the tax thus upon the duplicate, Wilson and others, taxpayers of the township, brought an action to enjoin the collection of the portion assessed against them. The case was brought here on appeal. It was in the decision of that case that this court said that the alleged insolvency of the railway company, and its alleged inability to complete the road, did not render the tax invalid, or afford to the plaintiffs in

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the case sufficient ground for enjoining its collection. *Wilson v. Board, etc.*, 68 Ind. 507.

The question and the facts involved in that case were different from those involved in the case before us. At the time that action was commenced the Anderson, Lebanon and St. Louis Railroad Company not only had a legal existence, but also, so to speak, a practical existence. And, although it was alleged that the company was insolvent, it was in the possession, as owner, of the road and all its corporate property. The tax, when collected, was to go, as it did, to the railway company which the taxpayers intended to aid in return for an equal amount of its stock. The shares of stock, as issued, represented so much of the corporate property, and, in the proportion that it bore to the whole amount of the stock, entitled the township to a voice in the management of the property and affairs of the company.

As applied to the case before the court, we adhere to the ruling in the case above, but do not think that it should be so applied or extended as to turn the case in hand in favor of the Midland Railway Company.

The only question involved in the case of *Board, etc.*, v. State, *ex rel.*, 86 Ind. 8, was whether or not the board of county commissioners had authority to make a third levy of taxes to raise the balance of the amount voted by the township in aid of the railroad company, the two prior levies having failed to produce the full amount, by reason of shrinkage in the value of the property in the township. It was held that the board had such authority; that it was its duty to exercise it, and that it could be compelled by mandate to perform that duty; and that, as the matter was one of public concern, any citizen of the township interested in the execution of the law might be the relator.

It was in that case that it was said, that when an appropriation of not exceeding two per centum of the taxable property of the preceding year has been lawfully made, such an appropriation becomes a binding obligation upon the

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township, from which it is not discharged by any subsequent shrinkage in the value or destruction of any part of its taxable property.

When an appropriation is once fully completed by all the steps required by the aid laws, and the subscription for stock is made by the county board as required by those laws, it does become a binding obligation upon the township. And, in the sense that for the purpose of fulfilling the requirements of those laws, and subserving the public interest, the county board may, in a case like that last above, be compelled to levy a tax to meet an appropriation voted by the township, that vote, and the preliminary steps leading to it, may be said to create a binding obligation upon the township. In the case last cited it was not necessary to decide whether or not a simple vote of an appropriation by a township, for the purpose of taking stock in a railway company, creates an obligation which the railway company can enforce by any sort of an action against the township, or creates such a right in the railway company as it may assign or mortgage. Those questions were not decided. What was there said must be limited to the exact case before the court. It should again be observed, that in that case the railway company, to aid which the appropriation was voted, owned the road and the corporate property, and that the taxes when collected would go to it in return for its stock.

The case of *Faris v. Reynolds*, 70 Ind. 359, is cited by counsel for appellee in support of their contention that, by the mortgage, its foreclosure, and the sale under the decree, the purchasers became the owners of the uncollected portions of the amount voted by the township. That question is not decided in that case. That was an action by taxpayers of the township to enjoin the collection of a tax levied for the purpose of aiding a railroad company by taking stock. In their petition to the county board the petitioners asked that the amount appropriated should be paid to the railroad company or its assigns. One of the grounds upon which they asked

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that the collection of the tax should be enjoined was, that the railway company had transferred its interest in the tax to other parties. In disposing of that question it was said: "It is not seen that any one is injured by the assignment of the claim. If the township gets the stock, which it is entitled to do either before or concurrently with the payment of the money, whether paid to the railroad company or its assigns, it can not be material whether the money is paid to the railroad company or its assigns. If the assignment is valid, the taxpayer is not injured. If invalid, it harms no one, and furnishes no reason why the tax should not be collected." It will be observed that the validity or invalidity of the assignment was not decided, and that no question as to the right of the assignees to enforce payment to them was involved.

The case of *State, ex rel., v. Board, etc.*, 92 Ind. 499, cited by counsel for appellee, is in every essential particular different from the case in hearing. In the first place, the railroad company, to aid which the appropriation was voted, owned the road, and hence, as already stated, stock in that company would represent the property, and entitle the township to a voice in the management of the affairs of the company. In the second place, the tax had been collected and was in the county treasury at the time the company assigned a portion of the amount which it claimed was due to it. In the third place, the county board approved of the assignment. And in the fourth place, before the action to compel the payment by mandate was brought, the railway company tendered the proper amount of certificates of its stock.

It was held that, in connection with the standing order that the amount collected should be invested in the stock of the company, the payment of previous amounts to the company, and the approval of the assignment of the portion to the bank, constituted a subscription to the stock of the railroad company within the meaning of the statutes. The case was

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not one of an attempted assignment by a railroad company of an uncollected tax, or of an amount voted, but neither collected nor placed upon the tax duplicate, as is the case before us, but was one of an assignment after the tax had been collected, and after a subscription to the stock of the railroad company had been made by the county board as the statute required.

Neither is the case of *Board, etc., v. Center Township*, 105 Ind. 422, either like or conclusive of the case before us. In that case, the appropriation was voted as a cash donation, and not by way of taking stock in the railway company. The amount had been collected and was in the county treasury. The trust deed specifically named the donation voted by the township and then in the treasury, as included within its terms. That the amount had been properly donated to the railway company was not questioned by counsel upon either side of the case. It was conceded in argument that the railway company claiming the money had succeeded to all of the rights of the old company in and to the donation.

The case before us must be disposed of and the rights of the parties settled upon the facts as developed by the record, and under the statutes in force at the time the mortgage was executed in 1875, as the Midland Railway Company can claim no rights except through that mortgage. The statute then in force, so far as is material here, was the act of 1869. Acts 1869, Spec. Sess., p. 92.

So far as is material here, the 14th section of that act was as follows: "Said board of commissioners may, after the assessment herein provided for, or any part thereof, shall have been collected, take stock in such railroad company, from time to time, in the name of the proper * * township, * * and pay therefor, when the same is taken, out of the moneys so collected as aforesaid," etc.

It is very plain from this section and the whole act that the simple voting of the aid by the township is not a subscription to the stock of the railroad company. That sub-

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scription is to be made by the county board, which, for that purpose, acts as the agent of the township. Until it executes that power and authority there is no perfected subscription to the stock of the company. It is just as necessary that the board should act in that regard in order to make a perfected subscription to the stock of the railway company, as that it should act upon the petition provided for by the first section of the act, in order that there may be a valid vote by the township. When the subscription is thus made, and not before, the township becomes the owner of the stock. And although certificates of the stock thus subscribed for may not be essential to the ownership of the stock by the township, yet, we think that in case of such subscriptions by county boards for townships, such certificates may be demanded as a condition to the payment of the money. That conclusion seems to be sanctioned by the case of *Faris v. Reynolds, supra*.

The case of *City of Mount Vernon v. Hovey*, 52 Ind. 563, cited by counsel for appellee, is not authority in support of the contention that the vote of the township constituted a subscription to the stock of the railroad company. In that case, the common council acted for the city, as the county board was authorized to act for the township, by the 14th section, *supra*, of the act of 1869. In that case, the common council made a donation to the railway company, in behalf of the city, and issued the bonds of the city, which had passed into the hands of innocent holders.

When a subscription was made by the county board under the act of 1869, the township was brought into contractual relations with the railway company, and it thus acquired rights which it could enforce by action and which it could assign. While the ownership of the stock subscribed for by the county board under that act passed to the township in return for the money paid, it seems not to have been essential that the payment of the money should accompany the subscription for the stock in order that the township should

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become the owner of such stock. The 17th section of the act provided as follows: "After the money authorized by this act to be appropriated shall have been levied and collected as aforesaid, and the subscription shall have been made on behalf of the * * township, * * the railroad company, for whose aid the same shall have been so levied and collected, having fully constructed the railroad, * * shall have the right to demand and have said money paid over according to the intent and meaning of this act," etc.

In the case of *Bittinger v. Bell*, *supra*, in speaking of the rights of railway companies under the above statutes, involved here, it was said: "It has been repeatedly decided by this court, * * * that, until the tax was levied and collected, and a legal and valid subscription had been made on behalf of the township, the railroad company did not have, and could not acquire, any legal right to or interest in the tax, which it could enforce by legal process."

In support of the statement thus made were cited *Board, etc., v. Louisville, etc., R. W. Co.*, 39 Ind. 192; *Sankey v. Terre Haute, etc., R. R. Co.*, 42 Ind. 402; *Petty v. Myers*, 49 Ind. 1; *Jager v. Doherty*, 61 Ind. 528. Those cases all fully support the statement as above quoted. So, too, does the case of *Hilton v. Mason*, 92 Ind. 157.

Until the railway company occupies a position which will enable it to enforce, in some way, whatever right or interest it may have in an appropriation voted, such voted appropriation is not a chose in action in its favor which it can assign or mortgage.

A chose in action has been defined to be a thing which a man has not the actual possession of, but which he has a right to demand by action. *Ramsey v. Gould*, 57 Barb. 398.

In the case of *Dial v. Gary*, 14 S. C. 573, it was said that a chose in action embraces two ideas: first, a visible, tangible thing; and, second, the right to sue for and recover that thing. That a railway company has no right in or to an appropriation voted for the purpose of taking stock in such

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company, which it can enforce by an action, or assign or in any way transfer to another, until the subscription for stock shall have been properly made by the county board, is recognized in the case of *City of Mount Vernon v. Hovey*, *supra*, and broadly asserted and ruled in the case of *Harshman v. Bates County*, 3 Dillon, 150; S. C. 92 U. S. 569.

In that case, an appropriation had been voted by a township, under a Missouri statute, for the purpose of taking stock in a designated railroad company. The county court, as was the board of county commissioners under the act of 1869, *supra*, was authorized to make the subscription to the stock of the railroad company in behalf of the township, and in pursuance of the vote. After the vote, but before the subscription by the county court, the designated railroad company was consolidated with another railroad company. After the consolidation, and without a further vote, the county court made a subscription to the stock of the consolidated company.

It was held that a vote of the people to take stock in the designated company did not authorize the county court to subscribe to the stock of the consolidated company, and that, therefore, the subscription to that company did not entitle it to the appropriation voted, and did not impose any obligation upon the township. The decision was placed upon the ground that the township had a right to insist upon stock in the railroad company for which the appropriation had been voted, and that they could not be compelled to accept stock in any other company.

In a note to the case by DILLON, J., and in distinguishing it from the case of *Nugent v. Supervisors, etc.*, 19 Wall. 241, it was said: "That case differs from the one above reported, in this: *There* the subscription to one of the constituent companies was *before* the consolidation, *here* it was *afterwards*. In this case there was nothing but a bare vote before the consolidation, and that, without more, creates no contract between the municipality and the railroad company," etc.

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The decision by DILLON, J., as, also, his reasoning, so far as we have stated it, were approved by the Supreme Court of the United States upon the appeal. See, also, *City of Mount Vernon v. Hovey*, *supra*.

That case is also distinguishable from a class of cases cited by counsel for appellee, where county officers or courts, authorized to subscribe for stock in behalf of townships, have subscribed to the stock of a consolidated company instead of to the stock of the company to which the aid was voted by the township, and where bonds have been issued in payment for the stock, which, without showing upon their face any informality or infirmity, have passed into the hands of *bona fide* holders.

In the case before us, as we have seen, the tax has not been collected, nor has it been placed upon the duplicate for collection. There has been no subscription for stock made by the county board, nor in any other way. The case is, therefore, materially different from some of the cases above noticed, and, in this regard, materially different from other cases cited by counsel for appellee, where it was held that, after a subscription for stock has been made, such subscription is a chose in action in favor of the railway company, which it may assign and alienate.

When a subscription is made in the manner required by the statute, the township is brought into contractual relations with the railway company, just as is an individual by a subscription for stock.

We do not think it necessary to extend this opinion to comment much more at length upon the cases of *Scott v. Hansheer*, 94 Ind. 1, and *Jussen v. Board, etc.*, 95 Ind. 567. As stated in the principal opinion, those cases involved appropriations by way of donations, and not by way of taking stock in the railway company. They did not involve the right of a railway company to assign an uncollected aid voted for the purpose of taking stock in such company. Those were cases where the railway companies to which the

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aid had been voted had been consolidated with other railway companies, and rest upon principles and rules of the law and statutes peculiar to such cases.

If it should be conceded that, by the simple vote of the township, a subscription to the stock of the Anderson, Lebanon and St. Louis Railroad Company was made, the Midland Railway Company would be in no better position to demand the money. Upon such a concession, we should be led to a consideration of a statute discussed by counsel on both sides of the case upon the original hearing, and again pressed for consideration by counsel for appellants in their brief resisting the petition for a rehearing. It was not thought necessary to extend the opinion in the decision of the case by a consideration of that statute, and we give it attention now, because of the earnestness with which counsel for appellee urge their petition for a rehearing, and because counsel for appellants again insist that it is conclusive of the real question involved in the case.

In 1865 (Acts 1865, Reg. Sess., p. 66; R. S. 1881, section 3945 *et seq.*) an act was passed entitled "An act to authorize, regulate, and confirm the sale of railroads, to enable purchasers of the same to form corporations and to exercise corporate powers," etc. The act provides that, in case of a sale of any railroad by virtue of any mortgage, by foreclosure, etc., the purchasers thereof, etc., may form a corporation, etc., with power to operate the railroad, etc.

The 3d section of the act (section 3947, R. S. 1881) provides that "Such corporation shall possess all the powers, rights, privileges, immunities, and franchises in respect to said railroad * * purchased, * * * which were possessed or enjoyed by the corporation that owned or held the said railroad, previous to such sale. * * * And it shall have power, at any time after the formation of the corporation as aforesaid, to assume any debts and liabilities of the former corporation, and to make such adjustment and settlement with any stockholder * * or creditor * * of such former corpo-

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ration as may be deemed expedient: * * * *Provided*, That all subscribers to the original stock of said railroad company, their heirs, executors, and administrators, shall (by the acceptance or adoption of this act by any purchaser or purchasers of any such railroad, as above provided) be released and discharged from all their unpaid subscriptions which shall not have been previously settled or arranged by agreement or compromise," etc.

Recognizing the fact that stock in an insolvent railway company, the property of which has been sold in a foreclosure or other judicial proceeding, is worthless, this statute was intended to protect subscribers by cancelling all obligations to pay unpaid subscriptions to such stock in all cases where there shall not have been an adjustment by agreement or compromise. In other words, the statute was intended to enact into a law the rule of fair dealing that no one shall be required to pay something for nothing.

In answer to one of appellee's contentions, it is enough to say that, in our judgment, it sufficiently appears from the record that the Midland Railway Company was incorporated under the above act, and, by virtue of the sale and such incorporation, became the owner of the property of the old company.

It is further contended on the part of appellee, that the statute is not applicable here, because it was enacted four years before any law was in existence authorizing townships to vote aid to railway companies, and that, therefore, the proviso in the section quoted could not have been intended to apply to a case like this.

The title of the act, as do its various sections, shows that it was not intended to subserve any mere temporary purpose. Its terms are general, and applicable to all cases arising subsequent to its passage.

The proviso was intended to, and does, protect all subscribers to stock in railway companies. That, at the time of its passage, there was no law authorizing municipal corpora-

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tions to vote aid and become stockholders in railway companies, does not change the matter. They may now, and at the time Noblesville township voted the aid, they had authority to thus become stockholders.

If it be conceded that by the petition to the county board, and by the vote of the people, Noblesville township became a subscriber to the stock of the Anderson, Lebanon and St. Louis Railroad Company, it thus came within the terms of the above statute, and became entitled to its protection, as any other subscriber to stock in that company.

To hold that the proviso protects only such of the subscribers to stock as may have signed the articles of incorporation of the old company, or that it protects only individual and not municipal subscribers to such stock, would be to give to the act such a construction as to make it work inequality and injustice as between subscribers to stock. Such a construction is not required, but, on the other hand, is forbidden, both by the spirit and letter of the act.

In support of our conclusion that the act is applicable to subscribers who may become such under subsequent statutes, see *State, ex rel., v. Chapin*, 110 Ind. 272.

If we are correct in our construction of the above act and the proviso in the third section, and that we are we have no doubt, Noblesville township was released and discharged from the unpaid subscription for stock in the Anderson, Lebanon and St. Louis Railroad Company by the sale of all of its property under the decree of foreclosure, and the subsequent incorporation of the purchasers as the Midland Railway Company, there having been no settlement with the township as provided by the statute under consideration.

Such statutes ought to be given a fair construction, and, at the same time, such a construction as will protect the taxpayers. This is shown by the Iowa and other cases. There was a statute in Iowa which, for aught we know, is in force yet, which provided that, in the giving of aid to railway companies, the taxpayers were entitled to receive stock in

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the corporation constructing the railroad, in the amount of taxes paid by each, etc. Under that statute aid was voted to a railway company by the people of a township. After the aid had been voted, the company to which the aid had been so voted, and before it had completed its road, sold and conveyed its unfinished railroad to another company.

In an action by a taxpayer to enjoin the collection of the tax (*Manning v. Mathews*, 66 Iowa, 675), the Supreme Court said: "The statute, in providing for the enforced contribution by taxation to aid the construction of railroads, contemplates that the taxpayer may become a stockholder, upon the ground, doubtless, that he ought not to be compelled to make contribution to a private enterprise, producing public benefits, wholly without compensation; and that, as the railroad is a thing of public nature, producing public benefits in which the taxpayer shares, he ought to be in the position, as a stockholder, to have a voice and influence in preserving its existence and controlling its use, so as to secure the public benefits for which it was built. The object of the statute was not primarily that the taxpayer should receive money or any other thing upon payment of his tax, but that he should receive the stock in the corporation building the road, to the end that he should have an interest in the road built. His stock, if separated from the railroad, would be to him as any other property. It can not be that the statute intended that he should be taxed to aid in the building of the railroad, and that, before his tax is collectible, the road could be alienated, and in its place the corporation could acquire bonds or other property, to be held for the benefit of the stockholders. The statute does not contemplate that the taxpayer shall hold an interest as a stockholder in any property other than the railroad. * * * It can not, therefore, be that the statute will permit taxes to be collected when it becomes certain that the taxpayer can have no interest in the railroad, the very thing for which he was taxed. It is plain, from the provision of the statute making the directors liable in double the par

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value of the stock in case the road is encumbered beyond the prescribed limit, that it is the purpose of the statute to preserve the existence of the road in the corporation building it, and thus preserve the taxpayer's interest therein." The tax was held uncollectible. To the same effect are the cases of *Blunt v. Carpenter*, 68 Iowa, 265, and *Cantillon v. Dubuque, etc., R. R. Co.*, 35 N. W. R. 620.

We think that it may reasonably be said of our statutes authorizing townships to aid railway companies by way of taking stock therein, that they contemplate that the township, by becoming a stockholder, may have such an interest in the property of the corporation as shares of stock usually represent, and such an influence in the management of the affairs of the corporation as any other holder of a like amount of stock usually has; and that the act of 1865, last above referred to, was enacted upon the theory that when a railway company no longer owns the railroad, by reason of a judicial sale as provided in that act, an unpaid subscription to its stock ought not to be coerced, because the subscriber can not acquire an interest in the railway, nor have a voice in its management.

We are aware, of course, that these aid laws have been upheld as against constitutional objections urged against them, upon the theory that the railroad in aid of which the money is to be appropriated is a work of public utility, to be constructed for the public good.

So far as the constitutionality of the laws is concerned, it may be said, as is said in some of the cases cited by counsel for appellee, that there is no difference between an appropriation by way of a donation and by way of taking stock in the railroad company. But it does not follow by any means that there is no difference in any respect between aid by a township by way of a donation and by way of taking stock. As we have seen, our statutes and our cases clearly create and recognize a distinction, and both secure to the township rights, when the aid is by way of a subscription

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for stock, which it does not have when the aid is by way of a donation. And both good morals and public policy sanction the extension of such protection to the township and taxpayers.

We repeat again, that this action is, in no sense, by the Anderson, Lebanon and St. Louis Railroad Company, nor by any one in its behalf, for its benefit, or for the benefit of its creditors.

The Midland Railway Company has, and can have, no right to the money should it be collected, for the reason that it claims and must claim through the mortgage, and that neither carried nor conveyed any interest in the aid voted which can be enforced in favor of that company; and for the further reason, that the act of 1865, *supra*, is in the way of an assertion of such right by that company. And while, as before stated, the record does not show that the Anderson, Lebanon and St. Louis Railroad Company has been dissolved by a judicial decree, we again state, as stated in the principal opinion, that it does not appear by anything shown in the record that there is any person or railroad company entitled to demand and receive the money upon the terms upon which it was voted, should it be collected.

We have examined with much care all of the cases cited by counsel for appellee and find nothing in any of them in conflict with what we here decide.

It would extend this opinion to an undue length to go into an examination and analysis of those cases. This is the only reason for not doing so. After a patient and laborious re-examination of the questions presented by the record, we are convinced that the conclusion reached in the principal opinion is correct, and that a rehearing should not be granted. The petition is, therefore, overruled.

We suggest that if the parties desire to remodel the pleadings, either by changes or by making them more specific, they ought to have leave to do so.

Filed July 10, 1888.

Cutsinger et al. v. Ballard.

No. 13,244.

CUTSINGER ET AL. v. BALLARD.

REAL ESTATE.—*Oral Contract to Convey.—Specific Performance.—Statute of Frauds.*—Where a father orally agrees to convey certain land to his son for services rendered after attaining his majority, and the latter in reliance upon the agreement enters into possession, and so continues uninterruptedly for more than twenty years, making lasting and valuable improvements, and treating the land as his own, while the father repeatedly declares that the land belongs to his son, the contract is withdrawn from the operation of the statute of frauds, and the son is entitled, upon the death of the father without making a deed, to a specific performance.

SAME.—*Trust.*—The son having fully performed his part of the contract and thereby paid the purchase-price for the land, his father thereafter held the title in trust for him, and, there being no open disavowal by the trustee, or insistence upon an adverse right, fully made known to the *cestui que trust*, no lapse of time is a bar to an action for specific performance.

SAME.—*Demand.—Repudiation of Contract.—Partition.*—A suit by other heirs for partition of the land occupied by the son under the agreement with his father, constituted such a repudiation of the contract as to render unnecessary a demand by him before filing a cross-complaint asking a decree for performance.

SAME.—*Proof of Contract.*—In a case for specific performance of an oral contract to convey land, while the proof must clearly establish the contract, it is yet a question for the court to determine whether the proof offered is sufficient for that purpose.

From the Johnson Circuit Court.

J. L. White, W. J. Buckingham, T. W. Woollen and D. D. Banta, for appellants.

R. M. Miller and H. C. Barnett, for appellee.

MITCHELL, J.—Julia A. Cutsinger and others, as plaintiffs, alleged in their complaint that they were tenants in common with John Ballard and his co-defendants, of certain real estate in Johnson county, of which Taylor Ballard, their common ancestor, died seized. Prayer for partition according to the respective interests of the parties.

115	93
117	313
119	291
123	70
115	93
126	284
115	93
131	292
115	93
126	356
115	93
138	82
115	93
158	285
115	93
163	548

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The defendant John Ballard set up by way of cross-complaint that he was in possession, and was the equitable owner under a contract made with his father, Taylor Ballard, in his lifetime, of a certain described tract of land which was embraced in the description of the real estate which the plaintiffs were seeking to have partitioned. He asked for the appointment of a commissioner to convey the land to him, and for a decree quieting his title.

The court made a special finding of the facts, and stated conclusions of law thereon.

So far as respects the issues tendered by the cross-complaint, the findings and conclusions were favorable to the cross-complainant. The facts material to be stated were, that John Ballard attained his majority in the year 1853, at which time his father agreed with him that if he would remain at home and work on the farm he would pay him a reasonable compensation in land. The appellee remained as requested, and worked for his father until the year 1859, rendering services which the court finds to have been reasonably worth \$1,440. At that time his father agreed to convey the land described in the cross-complaint to him as compensation for the services theretofore rendered. The land was unimproved woodland, worth about \$1,000. The appellee agreed to accept it as full compensation for his work, and, in reliance upon the promise of his father, went into possession, and cleared, fenced and ditched the land. He also erected a house, barn and other out-buildings, making valuable improvements of a lasting and permanent character of the value of \$2,000. He remained in possession continuously ever since, claiming title to the land and using it as his own, his father all the while recognizing his title and claim. Taylor Ballard died in January, 1885, without having made a deed. Without questioning the propriety of the conclusions of law stated, the appellants contend that the evidence does not support the finding of facts.

Starting with the proposition that the contract, being in

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parol, must be adjudged void unless the evidence shows that it was taken out of the operation of the statute by some of the exceptions allowed by courts of equity, the appellants insist that there was no proof that the appellee took possession of the land in dispute under a contract of sale, or that the improvements were made by him in pursuance of any contract. It is insisted, moreover, that there was no clear and satisfactory evidence of a contract between the father and son, and that the court was not, therefore, justified in finding the facts as returned.

It is undoubtedly the rule in cases like the present, that specific performance of an oral contract to convey land will not be decreed, unless the terms of the contract are either admitted or established by clear, definite and satisfactory evidence. The party seeking to enforce performance must prove the contract substantially as laid in his pleading, by satisfactory evidence, and he must in like manner show such a part performance on his part of the identical contract set up, and such acts done in reliance thereon, as that injustice would be done and a fraud perpetrated if the contract were held inoperative under the statute of frauds. *Purcell v. Miner*, 4 Wall. 513; *Williams v. Morris*, 95 U. S. 444; *Lobdell v. Lobdell*, 36 N. Y. 327.

Courts of equity have adopted the foregoing as the rule of evidence in cases for specific performance of oral contracts, and if at the end the evidence leaves it a matter of conjecture whether there was a contract, or if its terms are left uncertain, or if the possession or acts of part performance are not clearly referable to the contract, a decree for specific performance ought to be withheld. *Green v. Groves*, 109 Ind. 519.

In the present case it is shown by the testimony of a number of witnesses, that Taylor Ballard declared again and again that the tract of land in dispute belonged to his son John; that he had given it to him as compensation for six years' work performed after he had become of age. It is

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not disputed that the appellee worked for his father for the period mentioned, nor is it denied that he entered upon the land in 1859, and made the improvements as found by the court, and that he continued in the open and notorious possession for more than twenty-six years before the commencement of the suit, during all of which time he claimed and used the land as his own.

The statute of frauds can, therefore, have but slight if any influence upon such a case. *Freeman v. Freeman*, 43 N. Y. 34.

Although a contract for the conveyance of real estate may rest in parol, yet where it is fair in all its parts, and the purchaser has paid the consideration, and has been put into possession under the contract, and has made lasting and valuable improvements in reliance thereon, the contract will be regarded as withdrawn from the operation of the statute and will be enforced. *Atkinson v. Jackson*, 8 Ind. 31; *Winslow v. Winslow*, 52 Ind. 8; *Wallace v. Long*, 105 Ind. 522; *Drum v. Stevens*, 94 Ind. 181.

While it is true that evidence which consists of the casual declarations of a party to mere strangers to the transaction ought to be scrutinized closely, and acted upon with great caution when it is proposed by that method to establish a contract to convey land, yet, where such declarations correspond with other substantial facts which are satisfactorily established, such as the payment or performance of the consideration of the contract, the taking and continuing in possession under a known and acknowledged claim of a contract, and the making of lasting and valuable improvements under such a claim, they may become the most potent and satisfactory proof. Conceding the rule to be, in cases for specific performance, that the proof must establish the contract clearly, definitely and satisfactorily, it is, nevertheless, a question for the chancellor to determine whether the proof offered is sufficient to show the existence of the contract with the requisite degree of clearness and certainty. Look-

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ing into the evidence, we can not say that it may not have established all the requisites to the enforcement of the contract, within the rule already stated. *Burns v. Fox*, 113 Ind. 205.

Whatever else may be said of the contract as shown by the evidence, it was certainly sufficient to show the character of the possession taken and held by John Ballard. Having taken and continued in the exclusive, uninterrupted, adverse possession of the land for more than twenty years, the title of Taylor Ballard was extinguished, and John Ballard became vested with a title in fee, unless it was affirmatively shown that he was in possession as tenant, or in some capacity other than that of owner, and in a relation subordinate to his father. *Roots v. Beck*, 109 Ind. 472; *Riggs v. Riley*, 113 Ind. 208; *School District v. Benson*, 31 Maine, 381. The appellants make no such claim upon the evidence in this case.

It is said, however, that there should have been a demand for a conveyance before filing the cross-complaint. There is no force in the suggestion. The plaintiffs, by bringing suit for partition, and alleging that the land in dispute was part of the real estate which descended to the heirs of Taylor Ballard as tenants in common, repudiated the contract made by their ancestor. In such a case a demand is not necessary. *Burns v. Fox, supra*; *Stix v. Sadler*, 109 Ind. 254.

So, also, the objection that the appellee was guilty of laches in seeking a remedy for the specific performance of the contract, is without force as applied to a case like the present. The appellee having fully performed his part of the contract, and thereby paid the entire purchase-price for the land, his father held the title thereafter in trust for him, and until a trust is openly disavowed by the trustee, who insists upon an adverse right which is fully made known to the *cestui que trust*, no lapse of time is a bar as between the latter and his trustee. *Oliver v. Piatt*, 3 How. 333 (412); *Decouche v. Savetier*, 3 Johns. Ch. 190.

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The evidence shows, without contradiction, in the present case that Taylor Ballard uniformly declared that the land in dispute belonged to his son John; that he had given it to him as compensation for his work.

We have found no error. The judgment is affirmed, with costs.

Filed May 29, 1888.

115 98
124 172
125 256

No. 13,128.

ELLIOTT v. GREGORY.

MARRIED WOMAN.—*Contract.*—*Liability for Medical Services.*—Under section 5115, R. S. 1881, removing the disabilities of married women to make contracts, coverture is not a defence to an action by a physician for medical services rendered to a wife at her request and upon her promise to pay for the same.

From the Posey Circuit Court.

E. D. Owen, for appellant.

W. P. Edson and *F. D. Wimmer*, for appellee.

NIBLACK, C. J.—Complaint by Cyrenus Elliott, a practising physician, against Charlotte Gregory, upon an account for medical services rendered to the latter at her special instance and request, and upon her express promise to pay for such services.

The defendant answered that, at the time of the rendition of the services mentioned in the complaint, and at the time of making the supposed promise therein alleged, she was a married woman, and the wife of Alvis Gregory; that the services charged for were for necessary medical care and atten-

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tion rendered to her during the time she was the wife of the said Alvis Gregory, and that the indebtedness to the plaintiff on account of such services was the debt of the said Alvis Gregory, for which she, the defendant, as his wife, could not make herself liable.

A demurrer to this answer was overruled, and the court, without requiring a reply, empanelled a jury to try the cause, the result being a verdict and judgment for the defendant.

Error is assigned only upon the overruling of the demurrer to the answer of Mrs. Gregory. Counsel inform us that the answer was treated at the trial as amounting only to an argumentative denial of the allegations of the complaint, but the record discloses nothing on that subject.

In support of the sufficiency of the answer, it is sought to be maintained that it did, in legal effect, amount only to an argumentative denial of the complaint, and that, therefore, it constituted a good defence to the action. But we do not so construe the answer. It was an answer in confession and in avoidance. It impliedly admitted the rendition of the services sued for, and Mrs. Gregory's promise to pay for the same, and then set up her coverture as a protection against her liability to pay for such services. These made the pleading a formal, as well as a substantial, answer of coverture to the action. This, under existing statutes and our decisions upon them, was not a good defence to the complaint.

Section 5115, R. S. 1881, declares that "All the legal disabilities of married women to make contracts are hereby abolished, except as herein otherwise provided." In the construction of this section we have held that a married woman's ability to contract is now the rule, and that her disability to do so constitutes the exception. *Arnold v. Engleman*, 103 Ind. 512; *Bennett v. Mattingly*, 110 Ind. 197.

The answer under consideration did not base Mrs. Gregory's defence upon any of the exceptional disabilities still imposed on married women. On the contrary, the allegations of the complaint, which were impliedly admitted by

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the answer, made a case affirmatively in which coverture was no disability. The circuit court, consequently, erred in overruling the demurrer to the answer.

It ought not, however, to be inferred from what we have said that a husband is not now liable for medical attendance upon his wife, as much as he ever would have been, in the absence of some express agreement or arrangement to the contrary.

The judgment is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Filed May 29, 1888.

No. 13,361.

WILLIS ET AL. v. CUSHMAN.

EXEMPTION FROM EXECUTION.—*Law Governing.*—*Bankruptcy.*—*Revivor of Discharged Debt.*—*Promissory Note.*—Where a debtor, who was discharged in bankruptcy in 1879, afterwards, in 1880, executes a new note for a debt from which he was released by the discharge, the original debt is revived, but only as of the date of the new note; and where a judgment is obtained upon such note, the debtor is entitled to claim an exemption of six hundred dollars, as provided by the law in force at the time of its execution.

From the Sullivan Circuit Court.

J. C. Briggs and *W. C. Hultz*, for appellants.

W. S. Maple, *J. T. Beasley* and *A. B. Williams*, for appellee.

HOWK, J.—In this case errors are assigned here by appellants, defendants below, which call in question (1) for the first time the sufficiency of the facts stated in the complaint

to constitute a cause of action, and (2) the trial court's conclusions of law upon its special finding of facts herein.

Plaintiff, Cushman, sued the defendants herein in an action of replevin, to recover the possession of certain personal property, all in Sullivan county, Indiana. The complaint was good beyond all doubt when questioned, as it was, after trial and finding thereon, with all their curative virtues, for the first time by an assignment of error in this court. Defendants answered by a general denial of the complaint herein. The issues joined were tried by the court, and, at defendants' request, the court made a special finding of facts herein, and thereon stated conclusions of law in favor of plaintiff, and rendered judgment accordingly.

The facts found by the court were, substantially, as follows:

1. On the 2d day of January, 1875, plaintiff became indebted to one James K. Medsker in the sum of \$250, and plaintiff then executed to Medsker his promissory note for such debt.

2. On the — day of —, 1879, plaintiff, Cushman, was duly discharged in bankruptcy by the United States Court, having competent authority in that behalf, and received his discharge as provided by law; and the aforesaid debt was duly filed in said bankruptcy proceeding, and allowed by the court therein, but no part of the debt was paid at the time said Cushman so received his discharge in bankruptcy.

3. On February 1st, 1880, plaintiff executed his promissory note to said Medsker in the sum of \$308.25, with interest at 6 per cent. per annum, and due three years after date, waiving valuation or appraisement laws; which last mentioned note was given for said debt evidenced by the note so filed in bankruptcy as aforesaid, with the accrued interest, and for no other consideration.

4. On the — day of March, 1883, said last mentioned note was assigned to defendant William A. Hawkins for a valuable and sufficient consideration.

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5. Defendant William A. Hawkins duly recovered a judgment on said last executed note, in the Sullivan Circuit Court, at its June term, 1885, against said Thomas K. Cushman for \$272.35, the balance of unpaid principal and interest thereof, which judgment is still in full force and unpaid, and has never been stayed, and said judgment was rendered on July 3d, 1885.

6. On July 27th, 1885, an execution was duly issued on said judgment, on the order of said Hawkins, by the clerk of such court, and delivered to defendant Willis, sheriff of Sullivan county, who, on January 12th, 1886, levied said execution on certain described personal property, being the same now in suit. Plaintiff claimed such property as exempt from said execution, and claimed and demanded that \$600 worth of property should be set off to him and exempted from said execution, and defendants only conceded to plaintiff the right to have \$300 worth of property set off and exempted from said execution.

7. Plaintiff thereupon prepared a proper schedule and appraisement, and presented the same to defendant Willis, then sheriff of such county, and claimed said property as exempt from sale on said execution, and demanded that the same should be set apart as exempt, all of which proceedings, claiming said property as exempt, were had and done in due form of law, and said property was and is of the value of \$500. The defendants requested plaintiff to select out of said property an amount equal in value to \$300, but plaintiff refused to select any part thereof, but claimed and demanded all of said property as exempt from sale on said execution, and defendants refused such demand.

8. The plaintiff is, and for ten years last past has been, a resident householder of Sullivan county, Indiana.

9. On June 23d, 1886, plaintiff commenced this suit for the replevin of said property.

10. Proper steps have been taken to preserve the said levy by duly issuing a *venditioni exponas*.

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11. Said execution was issued on a judgment as aforesaid, which said judgment was founded on a complaint, which said complaint was in these words: Setting out a copy of William A. Hawkins' complaint on the note last executed on the 1st day of February, 1880, and also a copy of such note, which we omit.

Upon the foregoing facts the trial court stated its conclusions of law, substantially, as follows :

1. Plaintiff is entitled to have \$600 worth of property exempt from sale on said execution.

2. Plaintiff is the owner, and entitled to the possession, of the property described in finding No. 6.

(Signed) "JOHN T. HAYS, *Special Judge.*"

We are of opinion that, upon the facts specially found, the trial court did not err in its conclusions of law, or either of them. The question for decision in this case may be thus stated: Upon the facts found by the trial court, what amount of property was the plaintiff, Cushman, entitled to claim and hold, under the law of this State, as exempt from seizure or sale for the payment of his debt to the defendant Hawkins? The defendants virtually conceded that plaintiff was entitled to claim \$300 worth of property as exempt from seizure or sale on said Hawkins' execution, for the court found as a fact that they requested plaintiff to select out of his property an amount equal in value to \$300. But plaintiff claimed and demanded all of his property, which the court found to be of the value of \$500, as exempt from sale on said execution. In section 22 of the Bill of Rights of our State Constitution of November 1st, 1851, it is provided as follows:

"The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted; and there shall be no imprisonment for debt, except in case of fraud."

In accordance with the requirements of this section of the

Bill of Rights, the General Assembly of this State, at the first session thereof after the taking effect of the Constitution of 1851, enacted a law entitled "An act to exempt property from sale in certain cases," approved February 17th, 1852. In the first section of this act it was provided that an amount of property, not exceeding in value \$300, owned by any resident householder, should not be liable to sale on execution, or any other final process from a court, for any debt growing out of or founded upon a contract, express or implied, "after the 4th of July," 1852. 2 R. S. 1876, p. 353. This section remained in force, just as it was enacted, until May 31st, 1879, when it was superseded by an amended section, now known as section 703, Rev. Stat. 1881, and since in force, which reads as follows:

"An amount of property not exceeding in value six hundred dollars, owned by any resident householder, shall not be liable to sale on execution or any other final process from a court, for any debt growing out of or founded upon a contract, express or implied, after the taking effect of this act."

Applying this statement of our exemption laws to the facts found by the trial court, it will be seen that when plaintiff first became indebted to James K. Medsker, on the 2d day of January, 1875, the law allowing an exemption of property not exceeding in value \$300 was in force, and that when plaintiff gave Medsker a new note for the debt, on February 1st, 1880, the law allowing an exemption of property not exceeding in value \$600 was, as it still is, in full force. Hawkins recovered his judgment on the note last executed, but he claims that plaintiff is entitled to an exemption of only \$300 worth of property on the execution on his judgment, because, he says that the note last executed was given for the same debt evidenced by plaintiff's first note to Medsker.

There can be no doubt that plaintiff's discharge in bankruptcy, as found by the court, released him absolutely from all legal and personal liability upon his first promissory note

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to said James K. Medsker. Such discharge operated as an actual extinguishment of all pre-existing debts, claims, liabilities and demands, against the said bankrupt Medsker, which were or might have been proved against his estate in bankruptcy. Section 5119, Rev. Stat. U. S.; *Root v. Espy*, 93 Ind. 511; *Post v. Losey*, 111 Ind. 74.

But while this is so, plaintiff's discharge in bankruptcy did not pay his debt to Medsker, but left him morally bound to pay such debt if able to do so at some future time. This moral obligation resting on plaintiff constituted a sufficient consideration for the promissory note he executed to Medsker after his discharge in bankruptcy, on the 1st day of February, 1880, as found by the trial court. It is true that the new promissory note revived the original debt of plaintiff to Medsker. *Carey v. Hess*, 112 Ind. 398, and cases cited. But it can not be said, we think, that the laws in force at the time the original debt was contracted, and repealed or superseded before the execution of the new note, are also revived and made the measure of the rights and remedies of the parties in relation to said new note. On the contrary, it must be held that the rights and remedies of the parties to such new note must be measured and governed by the statutes affecting their rights and remedies in force at the time the remedy is sought. The original debt was revived when the new promissory note was given, not as of the date when such original debt was contracted, but as of the date of such new note. See *Davis v. Rupe*, 114 Ind. 588.

The judgment is affirmed, with costs.

Filed May 29, 1888.

Roushlang v. The Chicago and Atlantic Railway Company.

No. 13,207.

ROUSHLANGE v. THE CHICAGO AND ATLANTIC RAILWAY COMPANY.

RAILROAD.—Deed to Right of Way.—Subsequent Encroachment Upon Adjoining Land of Grantor.—Construction and Repair of Road-Bed.—Damages.—Negligence.—A railroad company which has received a deed and paid the consideration for land upon which to construct and operate its road, is liable to the grantor for injuries subsequently caused to his land adjoining the right of way by the construction and repair of its road-bed in such a manner as to encroach thereon, without regard to any question of negligence on its part or knowledge that its works would cause the injury. **MITCHELL and HOWE, JJ.**, dissent.

From the Lake Circuit Court.

M. Wood and T. J. Wood, for appellant.

J. S. Slick and W. O. Johnson, for appellee.

ZOLLARS, J.—It is averred in appellant's complaint that the railway company had constructed its road across his land "after purchase made and consideration paid for the right of way by the defendant to the plaintiff, and after the plaintiff had conveyed the right of way to the defendant by a good and sufficient deed." It is averred, also, that a portion of the land over which the railroad was constructed was marshy; that through that portion the railway company made an embankment about twelve feet high; that, after the road had been used for about six months, the embankment, thus constructed, began to sink; that, to keep the grade up to the original height, the railway company deposited upon the top of the embankment a large amount of earth, sand and other material; that, as the same was thus deposited, the embankment kept sinking until the road-bed finally became settled and solid; that a large amount of the earth and other material thus deposited, as it sank, spread and extended under the surface of the land beyond the land of the railway com-

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pany and upheaved the plaintiff's land adjoining the right of way and rendered worthless several acres of it, etc.

There is no charge of negligence against the railway company, unless the facts stated show it to have been negligent in the construction of its road. Claiming that no negligence is charged, its counsel insist that the complaint does not make a case against it, admitting all of the averments therein to be true, as the demurrer does. These general propositions are established by the authorities:

First. A deed of land to a railway company for its right of way is presumed to include a license to do what is necessary and lawful in the construction and management of its road thereon, to the same extent and with the same effect as if the land had been compulsorily taken by condemnation proceedings. But, notwithstanding the deed, the company remains liable for injuries arising from negligence and unskilfulness in the construction of its road. *Pierce Railroads*, pp. 133-134; see, also, *1 Rorer Railroads*, pp. 313-314; *Mills Eminent Domain* (2d ed.), section 110.

Second. As in condemnation proceedings it is presumed that the assessment of damages includes all damages proper to be assessed, so, deeds of rights of way are presumed to include all damages arising from the proper construction of the road. The price agreed upon is presumed to be the same that the commissioners would have arrived at on an assessment of damages. *Mills Eminent Domain* (2d ed.), section 110; *Chicago, etc., R. W. Co. v. Smith*, 111 Ill. 363.

Third. The rule as to what damages may be assessed by the commissioners in a condemnation proceeding is, that the value of the land appropriated should be considered, together with any injury to the residue of the land naturally resulting, or that might reasonably be expected to result, from the appropriation and the construction of the road in a proper and lawful manner. *White Water Valley R. R. Co. v. McClure*, 29 Ind. 536; *Grand Rapids, etc., R. R. Co. v. Horn*, 41 Ind. 479 (484); *Indiana, etc., R. W. Co. v. Allen*,

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100 Ind. 409 (412); *Southside R. R. Co. v. Daniel*, 20 Gratt. 344; *Chicago, etc., R. R. Co. v. Springfield, etc., R. R. Co.*, 67 Ill. 143; *Chicago, etc., R. W. Co. v. Smith*, *supra*.

Fourth. Such assessment of damages will not be presumed to cover damages resulting from the negligent construction of the road, or any portion of it, nor damages resulting from improper encroachments upon land outside of the right of way.

The above stated rules of law require a holding here that unless the rights of the railway company are enlarged, or its liabilities limited by the terms of the deed, appellant can recover such damages, and only such damages, as might properly have been assessed had the right of way through his land been taken by condemnation proceedings instead of by grant.

The complaint shows that appellant granted to the railway company a right of way through his land for the construction and operation of its road. It is not claimed that the deed conveyed any rights except the right of way, and such as are incidental to the general grant. It is not stated in the complaint how wide the strip thus granted was, but it is shown that in the construction of the road the company has occupied land outside of the strip granted.

The general rule is, that, in the construction of its road upon an acquired right of way, a railway company is not liable beyond the compensation assessed or agreed upon, where such compensation is fixed prior to the building of the road, unless it is guilty of negligence in such construction. That rule, however, must be limited to cases where the railway is constructed upon and within the limits of the right of way so acquired.

Clearly, if a railway company should condemn or purchase a right of way of a certain width, and pay the damages assessed or agreed upon as resulting from the construction of its road upon that strip, it could not successfully claim the right to so construct its road as to cover land outside of the

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limits of such strip without the payment of additional compensation or additional damages resulting from such construction.

If that were so, the company might condemn a strip of land twenty feet wide, and in the building and maintenance of high, and necessarily wide, embankments, cover and occupy a strip fifty or one hundred feet wide, without the payment of compensation, or damages resulting from such occupancy.

The real question in the case before us is not one of negligence, but of an encroachment upon land outside of the company's right of way. When the company discovered that its road-bed was sinking, could it, without making compensation, or the payment of damages, have gone upon appellant's land and constructed walls or banks to prevent the road-bed from sinking and spreading? Clearly not. That it did not do, but, what in effect was the same thing, it filled in earth and other materials until the embankment spread out beyond the right of way upon appellant's adjoining lands, and upheaved the surface and caused the injury described in the complaint.

It may be that the company had no knowledge that the filling would cause the spreading of the embankment and the upheaval of appellant's land. Whether or not it had such knowledge is not stated in the complaint; nor do we think that it is material in this case. By reason of the filling upon the embankment it was caused to spread upon appellant's land and caused the injury. That the railway company may have had no knowledge that the filling would cause the injury is not sufficient to exonerate it from liability.

The fact remains that appellant granted to the railway company a strip of land upon which to construct and operate its road, and it has so constructed it as to make it rest, not only upon the strip thus granted, but also upon his adjoining land, not granted. The railway company is thus occupying land which was not granted to it, and which neither

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party intended should be either granted to it or occupied by its road.

The road is no less an encroachment upon appellant's land because its foundation is beneath the surface. That fact might affect the amount of damages, but it does not alter the rights of the parties. The railway company had a right to construct its road upon the strip of land granted, but it has no right to occupy additional land without compensation or the payment of damages. The strip of land was granted before the road was constructed, and hence, the consideration paid must be presumed to have been measured by the value of the land granted and the anticipated damages, in the light of surrounding circumstances and the knowledge of the parties at that time. It surely was not intended at that time that the road-bed should cover and rest upon land outside of the strip granted. Nor could it have been anticipated that in the construction of the road land outside of the right of way would be occupied by the road-bed or any portion of it. It would not be reasonable, therefore, to assume that in fixing the compensation the parties included damages for such encroachment.

Had the strip of land been taken by condemnation instead of by grant, the commissioners or jury in assessing the damages could not have included damages from such encroachment: First, because they could not have assumed that the railway company would voluntarily so construct its road as to make it rest partially upon land outside of the right of way. To have assumed that, and to have assessed damages accordingly, would have been to assume that the railway company would commit a trespass, and to have assessed, in advance, damages resulting from such trespass. Second, because they could not have known in advance that the result of the fill would be to cause the embankment to so spread as to encroach upon appellant's land and cause injury. Such an injury could not reasonably have been expected to result from the proper construction of the road.

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It will not be presumed that the parties included in the price agreed upon at the time of and for the grant any amount for injuries which could not properly have been considered by the commissioners and jury, had the right of way been taken by condemnation proceedings.

This case is clearly distinguishable from the case of diminishing the water of a spring upon the grantor's land, or a case of laying drains which are necessary, in connection with culverts under the road, to the proper maintenance of the road. Here, the road-bed is made to rest, not only upon the land granted, but also partially upon land not granted, outside of the right of way, and for which there has been no compensation.

If, here, the company may, by virtue of the grant of the right of way, without the payment of damages, so construct its road as to cover one or two acres of land outside of the grant, we know of no reason why other railway companies under similar grants may not procure a narrow strip of land as a right of way, and without further compensation or damages so construct their roads as to occupy a strip one, two, three, four or more times as wide as the strip so granted.

Whatever the railway company may be able to show by an answer and evidence, we think that the complaint makes a case for damages, and that the demurrer thereto was improperly sustained. For that error the judgment is reversed, at appellee's costs.

MITCHELL and HOWK, JJ., do not concur in the foregoing opinion.

Filed May 29, 1888.

Johnson v. Johnson *et al.*

No. 13,261.

JOHNSON v. JOHNSON ET AL.

TRIAL.—By Jury.—Suits of Equitable Cognizance.—A counter-claim by a married woman praying the cancellation, as void, of a mortgage sought to be foreclosed, presents an issue of equitable cognizance, and a trial by jury can not be demanded.

CHANGE OF VENUE.—Bill of Exceptions.—Supreme Court.—No question is presented upon a ruling denying a change of venue if the application therefor is not made a part of the record by a bill of exceptions.

From the Grant Circuit Court.

G. W. Harvey, for appellant.

J. T. Strange and *R. W. Bailey*, for appellees.

ELLIOTT, J.—The appellant instituted this suit upon a note and mortgage, and Charlotte Johnson filed a cross-complaint or counter-claim wherein she alleged that she was the wife of Berry Johnson; that the note and mortgage were executed by her as surety for her husband, who had borrowed the money of the mortgagee, and that she acquired the land mortgaged by gift from her father. The counter-claim prayed a cancellation of the mortgage. After issue joined on the counter-claim the appellant dismissed his complaint.

There is no bill of exceptions presenting the motion or affidavit for a change of venue, and, consequently, no question is before us upon the ruling denying a change of venue.

The issue joined on the counter-claim was one of equitable cognizance, and the court did not err in denying the appellant's request for a trial by jury.

Judgment affirmed.

Filed May 11, 1888.

Silver v. Parr.

No. 13,292.

115	113
163	452

SILVER v. PARR.

INSTRUCTIONS TO JURY.—*Refusal to Give.*—*Presumption.*—Where the evidence is not in the record, it will be presumed that instructions which the trial court refused to give, on request, were refused because not applicable to the case made by the evidence.

SAME.—*Must be Signed by Judge.*—*Practice.*—Under the sixth clause of section 533, R. S. 1881, neither instructions requested by a party and refused by the court, nor those given by the court of its own motion, can be made a part of the record unless signed by the trial judge.

From the Hamilton Circuit Court.

J. Stafford and *T. E. Boyd*, for appellant.

T. J. Kane and *T. P. Davis*, for appellee.

HOWK, J.—This was a suit by appellant, Silver, against appellee, Parr, as defendant in a complaint of three paragraphs. The object of the suit was to recover damages which plaintiff claimed he had sustained by reason of the careless and negligent treatment he had received from defendant, who had undertaken, as a practising surgeon, to set the broken bones of plaintiff's leg, and to attend to and cure and heal the same for a fee and reward, etc.

Defendant answered by a general denial of plaintiff's complaint. The issues joined were tried by a jury, and a verdict was returned for the defendant, and, over plaintiff's motion for a new trial, the court adjudged that the defendant recover of the plaintiff his costs herein, taxed at, etc.

From this judgment plaintiff has appealed, and has here assigned as error the overruling of his motion for a new trial.

The evidence is not in the record. The only grounds upon which plaintiff's counsel rely for the reversal of the judgment below are (1) that the court erred in giving the jury certain instructions of its own motion, and (2) error of the

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court in refusing to give the jury certain other instructions at the plaintiff's request.

So far as the instructions asked for by plaintiff and refused by the court are concerned, it is settled by our decisions that where, as in this case, the evidence is not in the record, it will be presumed here, in support of the ruling of the court below, that such instructions were properly refused, because they were not applicable to the case made by the evidence. *Freeze v. DePuy*, 57 Ind. 188; *Powers v. State*, 87 Ind. 144; *Louisville, etc., R. W. Co. v. Harrigan*, 94 Ind. 245; *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88.

The point is made by defendant's counsel, and seems to be well made, that none of the instructions, either those given by the court of its own motion or those requested by plaintiff and refused by the court, are properly in the record now before us, because, counsel say, none of such instructions were signed by the judge of the trial court.

In the *sixth* clause of section 533, R. S. 1881, it is provided, among other things, as follows, to wit: "All instructions given by the court must be signed by the judge, and filed, together with those asked for by the parties, as a part of the record." This language of the statute is mandatory, and has been so construed by this court. *Childress v. Callender*, 108 Ind. 394.

It has been held, also, that when it appears, as in the case we are now considering, that the instructions are not signed by the judge of the trial court, they do not become a part of the record. *Chicago, etc., R. R. Co. v. Hedges*, 105 Ind. 398. We must hold, therefore, in the cause now before us that the questions relied upon by plaintiff's counsel for the reversal of the judgment below are not properly presented by the record for our consideration and decision.

We have found no error in the record which requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed May 12, 1888.

Brannen v. The Kokomo, Greentown and Jerome Gravel Road Company.

No. 13,215.

**BRANNEN v. THE KOKOMO, GREENTOWN AND JEROME
GRAVEL ROAD COMPANY.**

NEGLIGENCE.—*Personal Injury.—Contributory Negligence of Third Person.*—

Where a person, himself without fault, is injured by the negligence of a turnpike company, while riding in a private conveyance over which he has no control and which is in charge of the owner, a competent driver, the latter's negligence will not defeat a recovery by such injured person.

SAME.—*Special Verdict.—Judgment Upon.*—Where it can not be determined from the facts found by the jury, in a special verdict, whether or not the plaintiff was free from negligence contributing to the injury sued for, he is not entitled to a judgment upon the special finding, unless it be shown that the injury was the result of the wilful wrong of the defendant.

SAME.—*Turnpike Company.—Coercing Payment of Toll.—Wilful Injury.*—A turnpike company may lawfully close its gates as a means of coercing the payment of toll; and where a gate-keeper, to prevent the passage of travellers who are apparently attempting to drive by without the payment of toll, suddenly lowers the gate-pole, whereby an occupant of the vehicle is injured, the company is not, without more, liable as for a wilful injury.

From the Howard Circuit Court.

J. C. Blacklidge, W. E. Blacklidge and B. C. H. Moon, for appellant.

M. Bell and W. C. Purdum, for appellee.

ZOLLARS, J.—In their special verdict, the jury found that, in 1884, the appellee was a gravel road corporation owning and operating the Kokomo, Greentown and Jerome gravel road as a toll-road; that, on the 30th day of October, 1884, Mary Carter was the employee and agent of the company, authorized to collect toll from travellers over the road; that she occupied a toll-house about one mile east of the city of Kokomo; that Jacob Templin, her son, lived with her and assisted in the collection of tolls; that about 8:30 P. M. of said day appellant was riding in a spring wagon drawn by

115	115
116	125
120	474
123	425
115	115
134	408
115	115
146	562
115	115
149	510
150	514

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two horses and driven by David Brannen, he being the owner of the horses and wagon; that there were in the wagon, besides appellant and said Brannen, four other persons, all of whom were on their way from Kokomo to near Greentown, some ten miles from that city; that the horses were but three years old, and one of them not gentle; that Brannen, the owner and driver, was considerably intoxicated, and when near the toll-gate, and intending to pass it without the payment of toll, stopped the horses, and, without speaking to them, struck them with a whip, which caused them to start and go in a lope and rapid gait, passing the toll-gate; that said Jacob Templin, who was collecting toll at the time, believing that the horses were thus driven with the intention of the persons in the wagon to run by the gate without the payment of toll, for the purpose of stopping them and compelling the payment of the proper toll, suddenly drew down the pole, erected for the purpose of preventing persons passing without the payment of toll, and in so doing, and by reason of the rapid driving, the same struck the front end of the wagon and threw from it the six persons and the three seats upon which they were riding, and appellant was injured and suffered damages in the sum of fifty dollars; that, had not the driver struck the horses and caused them to move so rapidly, the pole would not have been let down, and appellant would not have received the injury; that, the horses being young, it was an act of imprudence to strike them with a whip before passing the toll-gate, which act of imprudence or wilful misconduct contributed to appellant's injury; that neither of the persons in the wagon tendered or offered to pay any toll until after appellant had received the injury.

Upon the special verdict, the substance of which we have given above, appellant moved for judgment in his favor in the sum of fifty dollars. That motion was overruled and judgment was rendered for appellee for its costs. For a reversal of that judgment appellant prosecutes this appeal.

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That Brannen, the owner and driver of the team, was guilty, not only of negligence, but also of a positive wrong, in attempting to pass the gate as he did without the payment of toll, is clear beyond question.

Whether or not, in a case like this, where the injured party was voluntarily riding in a private conveyance, the negligence of the owner and driver, over whom he had no control, and who was a fit person to manage the horses, should be so imputed to him as to defeat a recovery on his part, assuming that he was without personal fault, and that the only wrong on the part of the defendant was negligence, is a question upon which the authorities are not in accord.

This court, however, has heretofore adopted and followed the line of decisions which hold that in such a case negligence will not be so imputed. *Town of Albion v. Hetrick*, 90 Ind. 545, 550 (46 Am. R. 230); *Terre Haute, etc., R. R. Co. v. McMurray*, 98 Ind. 358, 369 (49 Am. R. 752). See, also, *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186.

It is the settled law in this State, also, that where the ground of the action is negligence, it must be a case of un-mixed negligence; that is, the plaintiff, in order to recover in such an action, must be free from negligence which contributed to the injury. It is equally well settled here, that in such an action the plaintiff must allege in his complaint that he was free from negligence which contributed to the injury; that it must in some way be made to appear from the evidence that he was free from such negligence; and that, if from the whole evidence it can not be determined whether or not he was free from such negligence, the finding and judgment must be against him. *Stevens v. Lafayette, etc., G. R. Co.*, 99 Ind. 392; *Eberhart v. Reister*, 96 Ind. 478; *Louisville, etc., R. W. Co. v. Lockridge*, 93 Ind. 191; *Lyons v. Terre Haute, etc., R. R. Co.*, 101 Ind. 419; *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31; *Indiana, etc., R. W. Co. v. Greene*, 106 Ind. 279 (55 Am. R. 736); *City of Fort Wayne v. Coombs*, 107 Ind. 75; *Belt R. R. Co. v. Mann*,

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107 Ind. 89; *Cincinnati, etc., R. W. Co. v. Hiltzhauer*, 99 Ind. 486. See, also, *Pierce Railroads*, 298, and cases there cited.

In the case before us the facts were found by the jury, and hence, as to whether appellant, upon those facts, was, or was not, negligent, is a question of law for the court. *City of Indianapolis v. Cook*, 99 Ind. 10; *Conner v. Citizens Street R. W. Co.*, 105 Ind. 62 (55 Am. R. 177); *Pittsburgh, etc., R. Co. v. Spencer, supra*; *Town of Albion v. Hetrick, supra*; *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20.

As we have stated, when the issue is one of negligence, in order that the plaintiff may recover, it must be made to appear from the evidence that he was not guilty of negligence contributing to the injury. In this case, we are not called upon to pass upon the evidence, but upon the facts which the jury have found from the evidence. While there may be ground for argument as to whether the facts found affirmatively show appellant to have been guilty of wrong and contributory negligence, we think that there is no reasonable escape from the conclusion that the facts so found fail to show that he was not guilty of such wrong and negligence. The correctness of this conclusion will be made more apparent by a reference to some of the facts stated in the special verdict, without undertaking to state just how much weight should be given to each separately. In the first place, the intoxication of the driver and his course in striking the young horses and attempting to run them through the gate without the payment of toll, show, at least, that he was reckless and bold, if, indeed, he was not an unfit person to manage the team. In the second place, appellant must have known that toll was due and should be paid at the toll-gate. He knew, also, that no toll was paid or tendered before the attempt to pass the gate. There is nothing to show that he in any way remonstrated or objected to the course adopted by the driver to pass the gate without the payment of toll. For aught that is shown in the special verdict, he was ac-

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quiescing in the purpose of the driver, and all that he did in attempting to carry out that purpose.

Having reached the conclusion that appellant is not shown to have been free from wrong or negligence which contributed to the injury, it must follow that he can not recover, unless appellee is chargeable with something more than negligence.

If, upon the facts found, it may be declared as a matter of law that in the lowering of the gate-pole appellee is chargeable with a wilful wrong, appellant may recover, all other necessary facts being found in his favor, notwithstanding he is not shown to have been free from contributory negligence.

Contributory negligence ceases to be a defence when the wrong on the part of the defendant is, within the meaning of the law, wilful. *Terre Haute, etc., R. R. Co. v. Graham*, 95 Ind. 286 (48 Am. R. 719); *Ivens v. Cincinnati, etc., R. W. Co.*, 103 Ind. 27.

It remains, therefore, to determine whether the court ought to say, as a matter of law, that, upon the facts found in the special verdict, appellee was guilty of a wilful wrong which caused the injury to appellant.

In defining wilfulness, which will justify a recovery notwithstanding contributory negligence on the part of the plaintiff, it was said, in the late case of *Palmer v. Chicago, etc., R. R. Co.*, 112 Ind. 250, that there may be a wilful act in a legal sense, without a formal and direct intention to kill or wound any particular person; or, in other words, there may be a constructive or an implied intent without an express one.

In the case of *Pennsylvania Co. v. Sinclair*, 62 Ind. 301 (30 Am. R. 185), it was said: "When an intention to commit the injury exists, whether that intention be actual or constructive only, the wrongful act ceases to be a merely negligent injury, and becomes one of violence or aggression."

In the case of *Louisville, etc., R. W. Co. v. Bryan*, 107 Ind. 51, it was said: "To constitute a wilful injury, the act which

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produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of."

And again, in the case of *Belt R. R. Co. v. Mann, supra*, it was said: "It is beyond question, that to entitle one to recover for an injury to which his own negligence may have contributed, the injurious act or omission must have been purposely and intentionally committed, with a design to produce injury, or it must have been so committed under such circumstances as that its natural and probable consequence would be to produce injury to others. There must have been either an actual or constructive intent to commit the injury. The act must have involved conduct, *quasi criminal* in character." See, also, *Louisville, etc., R. W. Co. v. Ader*, 110 Ind. 376.

In the case of *Pennsylvania Company v. Sinclair, supra*, it was said: "As a matter of evidence, proof that the misconduct of the defendant was such as to evince an utter disregard of consequences, so as to imply a willingness to inflict the injury complained of, may tend to establish wilfulness on the part of the defendant." See, also, *Gregory v. Cleveland, etc., R. R. Co.*, 112 Ind. 385.

The law under which appellee was incorporated provides that the directors of the company may erect toll-gates and exact toll from persons travelling on the road. R. S. 1881, section 3640.

The purpose of the gate clearly is to enable the company to prevent the passage of travellers over the road without the payment of toll. In other words, it is intended to be a means of coercing the payment of the proper toll. The gate could be of no consequence if the company had not the right to close it, and thus prevent such passage of travellers over the road until the payment of the legal toll by them.

That the company has the right to close the gate and detain travellers until they pay the proper toll, is further shown

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by section 3643, which provides a penalty for the unreasonable detention of such travellers after they have paid the toll.

Section 3644 imposes a penalty upon persons who shall run by the toll-gate without the payment of toll, or who shall defraud the company out of the legal toll, but it does not, either expressly or by implication, take from the company the right to close its gates, and thus prevent the passage of travellers on the road until the proper toll shall have been paid.

The company, then, had the right to close the gate as a means of coercing the payment of the legal toll, and in so doing its act was neither "unlawful" nor "wrongful," as charged in the complaint, unless, by reason of the time and manner of the closing, it was guilty of negligence or a wilful wrong.

As we have seen, it can not be held liable in this action on the ground of negligence, because it is not made to appear that appellant was free from negligence which contributed to the injury.

There is not sufficient in the special verdict to justify the court in declaring, as a matter of law, under the rule of the cases above, that the injury was wilfully inflicted by the servant of the company, assuming that Templin is shown to have been a servant or agent of the company, so that it became liable for his acts.

It is stated in the verdict that, believing that the horses were driven fast with the intention on the part of those in the wagon of running by the gate without the payment of toll, for the purpose of stopping them and compelling the payment of the proper toll, Templin suddenly drew down the gate-pole. That does not show that Templin had any actual intention or purpose to injure appellant or others in the wagon. On the other hand, it shows that he was attempting to do what he had a legal right to do, viz., to stop them, and thus compel the payment of the proper toll. Nor

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is it shown that what he did was "done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of." It is stated in the verdict that, when near the toll-gate, Brannen stopped the horses and, without speaking to them, struck them with a whip, which caused them to start in a lope and rapid gait, but it is not stated how near to the gate they were thus struck and started. It may be that they were so near as to make the lowering of the gate-pole not only negligence, but such recklessness as to manifest a willingness to inflict the injury. On the other hand, the distance may have been such as to reasonably induce Templin to believe that he could lower the pole before the horses would reach it, and that, by so lowering it, those in the wagon would stop the horses before coming in collision with it. Upon any view that may properly be taken, there is not sufficient stated in the verdict to justify the court in concluding, as a matter of law, that the injury to appellant was wilfully inflicted.

Having reached the conclusions above stated, it will not be necessary for us to consider the contentions of appellee's counsel that the complaint does not charge that the injury was wilfully inflicted, and that the facts stated in the special verdict do not sufficiently show that Templin was a representative of the company, so as to make it liable for his acts.

Judgment affirmed, at appellant's costs.

Filed May 29, 1888.

 BUCHART v. Burger.

No. 13,178.

BUCHART v. BURGER.

BILL OF EXCEPTIONS.—*Date of Presentation to Judge.*—*Must be Stated in Bill.*—Under section 629, R. S. 1881, the date of presentation to the judge must be stated in the bill of exceptions. A statement on the back of the bill, viz.: "Tendered to me for approval and signature, March 15th, 1886," is not sufficient.

From the Dubois Circuit Court.

E. A. Ely, J. W. Wilson and T. H. Dillon, for appellant.

O. A. Trippet, for appellee.

ELLIOTT, J.—The appellee insists that there is no bill of exceptions in the record. On the back of the bill is written: "Tendered to me for approval and signature, March 15th, 1886." This is not sufficient. The statute in express terms requires that "the date of the presentation shall be stated in the bill of exceptions." R. S. 1881, section 629. It has been expressly decided that a statement on the margin or on the back of the bill is not sufficient. *Orton v. Tilden*, 110 Ind. 131 (139).

Judgment affirmed.

Filed May 17, 1888.

115	123
120	433
121	139
121	163
123	157
115	123
125	325
126	97
127	280
115	123
128	358
115	123
126	601
115	123
140	636

115	124
125	506
115	124
151	463

No. 13,316.

DEHORITY v. PAXON ET AL.

EXECUTION.—Levy.—Sale.—Value of Property.—Satisfaction of Judgment.—A levy upon personal property of the judgment debtor of sufficient value to satisfy the execution, is merely *prima facie* payment of the judgment, and if a sale regularly made fails to produce enough to pay the debt, the parties can not, while the sale stands unimpeached, have the judgment declared satisfied upon extraneous proof that the property sold was of sufficient value to satisfy it.

SAME.—Chattel Mortgage.—Foreclosure.—Value of Property Fixed by Highest Bid.—When a chattel mortgage has been foreclosed, either by proceedings in chancery or in pursuance of a power, the price paid by the highest bidder at an unimpeached sale regularly made, will, in the absence of fraud, be presumed to have conclusively fixed the value of the property for the purpose of being applied to the debt, and if it be insufficient for payment, there may be a new execution for the residue.

From the Madison Circuit Court.

M. S. Robinson, J. W. Lovett and M. A. Chipman, for appellant.

C. L. Henry and H. C. Ryan, for appellees.

MITCHELL, J.—Petition by Dehority to reinstate the record of an alleged unsatisfied judgment and decree foreclosing certain mortgages, entered at the June term, 1880, of the Madison Circuit Court, in favor of Frederick Tykle against Joseph R. Paxon and David Foland, for eighteen hundred dollars and upwards, which record it is alleged had been destroyed by fire, in a general destruction of the records of the Madison Circuit Court, resulting from the burning of the court-house on the 10th day of December, 1880.

It is alleged that the judgment and decree had been duly assigned by Tykle to Dehority. Simon and others, who were parties to the original decree, and were alleged to be the holders of junior mortgages on the real estate mortgaged to Tykle, answered, admitting the facts stated in the complaint or petition, but in avoidance they averred that both the

Dehority v. Paxon et al.

mortgages foreclosed by Tykle had been executed as a security for the same debt; that one covered certain real estate upon which the defendants held junior mortgages, to secure debts owing to them respectively by the mortgagors, and that the other, which had been duly foreclosed by the plaintiff's assignor, covered a large amount of personal property owned by the mortgagors, of the value of \$2,500, which property the plaintiff had caused to be sold by the sheriff on a certified copy of the decree of foreclosure mentioned in the complaint.

It is alleged that at the sale the plaintiff bid off and purchased the personal property covered by the chattel mortgage, for the nominal price of \$232, although it was reasonably worth \$2,500. As a conclusion drawn from the foregoing facts, the pleader states that the judgment and decree taken by Tykle, and by him assigned to the plaintiff, have been fully satisfied by the above mentioned sale.

The court held the answer sufficient on demurrer, and the only question involved relates to the propriety of this ruling.

Counsel for appellee assert and seek to maintain the proposition, that whenever property of a judgment debtor, of a value sufficient to satisfy the judgment, has been levied on, and the title of the judgment debtor has been divested and lost, whether by an execution sale or otherwise, the judgment is to be deemed satisfied to the extent of the value of the property thus taken. At least, it is said, this must be the rule as respects the execution plaintiff and those holding junior encumbrances. The proposition is not maintainable. It has often been broadly stated that a levy upon the judgment debtor's personal property of sufficient value to satisfy the execution, was, *per se*, an extinguishment of the judgment, and hence a satisfaction of the execution. The inaccuracy of this statement has been repeatedly shown. Such a levy is not an absolute satisfaction, but is to be considered a *prima facie* payment, or satisfaction *sub modo*.

If it appears that the levy has been regularly exhausted

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by a sale duly made, and that the sale has failed to produce a sum sufficient to satisfy the judgment, the levy and sale will be regarded as satisfaction *pro tanto*, and a new execution may be had for the residue.

The most that can be said is, that a levy upon goods of sufficient value to pay the judgment raises a presumption that the execution is satisfied. This presumption may be overcome by a return of the officer showing that the property had been duly and lawfully sold, and that a sale regularly made had not been productive of sufficient to pay the debt. *McIntosh v. Chew*, 1 Blackf. 289; *Neff v. Hagaman*, 78 Ind. 57; *McCabe v. Goodwine*, 65 Ind. 288; *Richey v. Merritt*, 108 Ind. 347; *United States v. Dashiel*, 3 Wall. 688; *Trapnall v. Richardson*, 13 Ark. 543 (58 Am. Dec. 338, and note); *Banta v. McClennan*, 14 N. J. Eq. 120.

As will be observed, the application of the rule relating to the effect of a levy is confined almost exclusively to cases where it appeared that, after sufficient property had been seized to satisfy the execution, the property had been wasted, or the levy released or in some other way rendered ineffectual, without the consent of a surety or other person occupying such a relation to the debt as entitled him to insist upon a sale of the property. In all such cases it is incumbent on the plaintiff to show why the property thus taken was not sold in the regular course, and the proceeds applied to the extinguishment of the debt. *Johnson v. Tuttle*, 9 N. J. Eq. 365.

The purpose of issuing an execution is to obtain satisfaction of the debt. The law will not tolerate the levying upon property merely as a security, or to protect the property for the accommodation of the debtor. *Parys & Co.'s Appeal*, 41 Pa. St. 273; *Landis v. Evans*, 113 Pa. St. 332; *Appeal of Larzelere*, 13 Atl. Rep. 85.

Where, however, property has been levied upon and regularly sold, and the proceeds properly applied, we know of no authority, nor can we conceive of any sound principle,

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which would permit an inquiry into the actual value of the property, with a view of showing that the judgment had been satisfied by the levy, without regard to the sum produced by the sale.

When property has been sold at public sale, after due and lawful notice, in pursuance of a decree of a court, parties are bound by the value of the property as fixed by the highest bidder, until the sale is set aside or in some way impeached for fraud or irregularity. "It is to be presumed that property sold at a regular sale fetches its true value," while a contrary presumption arises as to irregular sales. *Horn v. Ross*, 20 Ga. 210 (65 Am. Dec. 621).

If the price was so grossly inadequate as to shock a correct mind, this inadequacy of price might furnish a strong presumption of fraud or irregularity, and entitle the party injured to have the sale set aside upon seasonable application. *Fletcher v. McGill*, 110 Ind. 395.

If, however, parties to the decree affirm the sale, they also affirm the price at which the property sold. They can not, without questioning the validity and regularity of the sale, enter upon an inquiry concerning the value of the property.

The answer in the present case shows that the plaintiff's assignor foreclosed his chattel mortgage by proceedings in chancery. The appellees were parties to that decree. The sheriff afterwards took possession of the mortgaged chattels and sold them pursuant to the order of the court. This sale, as the answer affirmatively shows, produced an amount insufficient to pay the debt. Without in any manner attacking the sale or questioning its regularity, the appellees propose to satisfy the appellant's judgment by extraneous proof that the property sold and purchased by him was of sufficient value to satisfy the judgment. This can not be done.

When a chattel mortgage has been foreclosed, either by proceedings in chancery, or in pursuance of a power, the price paid by the highest bidder, at an unimpeached sale regularly made, will, in the absence of fraud, be presumed to

Stolte v. The State.

have conclusively fixed the value of the property for the purpose of being applied to the debt. *Lee v. Fox*, 113 Ind. 98.

There would be no propriety in requiring a mortgagee to go through the ceremony of foreclosing his mortgage and making a public sale of the property, if in the end he is to be charged with the amount that parties interested may be able to show the property was actually worth, without regard to the amount the sale produced. In contemplation of law, the only purpose of making a sale of mortgaged chattels, the legal title of which is conditionally in the mortgagee, is to ascertain their value as applicable to the mortgage debt, thus giving the mortgagor the benefit of his equity of redemption if the goods are worth more, or leaving him liable for the residue if they are worth less than the debt.

It was error to overrule the demurrer to the answer.

The judgment is reversed, with costs.

Filed May 30, 1888.

:

No. 14,212.

STOLTE v. THE STATE.

INTOXICATING LIQUOR.—*Unlawful Sale.—Proof.*—Upon an appeal from a conviction for unlawfully selling intoxicating liquor, the fact that the State did not prove the names of the alleged purchasers is immaterial if it appears that the defendant himself made such proof.

SAME.—*Weight of Evidence.—Reversal of Judgment.*—A judgment will not be reversed upon the weight of conflicting evidence.

From the Marion Criminal Court.

J. N. Scott, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

Zimmerman v. The State.

ZOLLARS, J.—Appellant was fined below for having sold intoxicating liquor on Sunday. The only ground urged for a reversal is, that the finding and judgment are not sustained by sufficient evidence.

It is claimed that the State did not prove the names of the persons to whom it claimed the liquor was sold, nor in any way identify them. Without deciding what the State proved, or was bound to prove in that regard, it is sufficient here that appellant by himself and his witnesses very clearly proved the names of those persons.

The real dispute was as to whether appellant sold them beer, as claimed by the State, or sweet cider, as claimed by him. Upon that question there was a conflict in the testimony. It was the right and duty of the trial court to determine the credibility of the witnesses, and it had facilities for doing that which it is impossible for this court to have. Where there is such a conflict, this court, as has been many times decided, will not reverse a judgment upon the weight of the evidence.

Judgment affirmed, with costs.

Filed May 30, 1888.

No. 14,356.

ZIMMERMAN v. THE STATE.

115	120
155	278

JUROR.—*Sheriff's Employee.*—*Incompetency of.*—*Criminal Cause.*—A person employed by a sheriff to serve subpoenas for witnesses in a criminal prosecution, is the agent, and, in a qualified sense, the deputy of such officer, and is incompetent to act as a juror in such cause.

From the Sullivan Circuit Court.

VOL. 115.—9

Zimmerman v. The State.

J. C. Chaney and *W. S. Maple*, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

ELLIOTT, J.—One of the jurors who tried this case, on his *voir dire*, made this statement: "I acted as bailiff, by appointment of the sheriff, in this cause, and as such subpoenaed the witnesses for the State herein at this term of this court for this day, and I had been placed upon the regular panel of jurors the day before to fill a vacancy therein." The appellant unsuccessfully challenged the juror for cause.

The challenge should have been sustained. A man called as a juror can not be permitted to act as the bailiff of the sheriff in serving subpoenas in a prosecution for a criminal offence and retain his place on the panel. A person who acts for the sheriff in a criminal case, in the capacity in which the juror challenged did act in this instance, can not be regarded as an impartial juror. We know, as matter of law, that the sheriff in such a case as this is not entitled to fees for serving subpoenas unless the accused is convicted, and he is, therefore, interested in securing a conviction.

A person employed by the sheriff to serve subpoenas is the agent, and, in a qualified sense, the deputy of that officer, and it is settled law that one who is in the employ of a person having a pecuniary interest in the result of the prosecution can not be a competent juror. Neither the sheriff nor a regularly constituted deputy would, it seems clear, be a competent juror, and we can not perceive why the principle on which that rule rests does not apply to bailiffs employed by the sheriff to serve subpoenas in a case which he is called upon to try. It is difficult to conceive any just ground upon which it can be held that a juror in a criminal prosecution may act for the sheriff and still retain his place on the jury. If the juror accepts employment from the sheriff, he destroys his competency to serve as a juror in the case wherein he acts for the sheriff. In our opinion the case before us falls

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fully within the rule laid down in the carefully considered case of *Block v. State*, 100 Ind. 357.

We adhere to the rule declared in the cases of *Johnson v. Holliday*, 79 Ind. 151, and *Indianapolis, etc., R. W. Co. v. Pitzer*, 109 Ind. 179, but we do not think that the rule applies to this case. The statement of the juror fully discloses his incompetency, and no explanation that he could make could break the force of his statement. The statement so clearly discloses his incompetency that nothing he could say would destroy the effect of that statement. The record, therefore, affirmatively shows that an incompetent juror was accepted despite the challenge of the appellant.

Judgment reversed.

Filed May 30, 1888.

No. 14,375.

PEHLMAN v. THE STATE.

CRIMINAL LAW.—*Defective Verdict.*—*Amendment.*—*Second Jeopardy.*—A defective verdict may be amended at any time before the jury are discharged, and the returning them to their room with instructions to correct a verdict in which the period of disfranchisement is left in blank, does not constitute a second jeopardy.

SAME.—*Separation of Jury.*—*Sealed Verdict.*—*Correction.*—Where jurors have been allowed to separate and return a sealed verdict, which, upon re-assembling in court, is found to be defective, they may be sent to their room to make the proper amendment, no power of the court or rights of the parties being waived by the permission to separate.

From the Tippecanoe Circuit Court.

J. F. McHugh, for appellant.

L. T. Michener, Attorney General, *J. H. Gillett* and *G. P. Haywood*, for the State.

Pehlman v. The State.

NIBLACK, C. J.—This was a prosecution upon affidavit and information against Louis Pehlman for purchasing and receiving stolen goods, knowing them to have been stolen. R. S. 1881, section 1935.

A jury was empanelled to try the cause. After the cause had been submitted to the jury it was agreed between the prosecuting attorney and counsel for Pehlman, in the presence and with the assent of the court, that if there should be an agreement upon a verdict after ten o'clock that night and before nine o'clock next morning, the jury might seal up their verdict, place it in the hands of their foreman, and then temporarily separate. The next morning about five o'clock the jury agreed upon a verdict, finding Pehlman guilty as charged, fixing his punishment at a fine of one dollar and imprisonment in the State's prison for one year and disfranchisement for a blank term of years. This verdict was signed, sealed up and taken charge of by the foreman, after which the jury separated. When the court met at nine o'clock on the same morning the jury had reassembled, and were in their appropriate place in the court-room.

Upon inquiry they responded that they had agreed upon a verdict, and delivered the verdict, to which they had agreed as above, to the court. After an inspection of the verdict, the court called the attention of the jury to the fact that it was defective in its failure to specify the time for which Pehlman should be disfranchised, and, upon its own motion, returned the verdict to the jury, directing them to again retire to their room to "consider and correct" their verdict. Over the objection and exception of Pehlman, the jury accordingly retired and soon after returned into court their amended verdict, fixing the term of his disfranchisement at two years. Pehlman thereupon moved the court for his discharge, upon the ground that he had been practically twice placed in jeopardy for the same offence, and, upon the further ground, that as the jury had separated after agreeing upon a verdict, they had no power either to amend their

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verdict or to return another verdict. His motion was, nevertheless, overruled.

Other motions designed to test the legality of the proceedings of the court and jury which resulted in the return of an amended verdict, were consecutively entered and overruled, and judgment followed upon the verdict as amended.

We are unable to see that any element of a second jeopardy was involved in the proceedings complained of. The verdict which was first returned was simply and only a defective verdict, and such a verdict may be amended at any time before the jury are discharged. Proffatt Jury Trials, section 456; 1 Works Prac., section 839; 1 Bishop Crim. Proc., section 1004.

This should ordinarily be done by requiring the jury to return to their room, with proper instructions as to the correction which ought to be made; but where the correction is merely formal, it may be made by direction of the court, in the presence and with the assent of the jury. *Noble v. Epperly*, 6 Ind. 468; *Reed v. Thayer*, 9 Ind. 157; *Jones v. Julian*, 12 Ind. 274; *Crocker v. Hoffman*, 48 Ind. 207; *Hyatt v. Clements*, 65 Ind. 12; *Clayton v. State*, 100 Ind. 201.

By permitting a jury to separate after they have agreed upon a verdict, and before it is returned into court, nothing is waived, either as to the power or duty of the court to have the verdict amended, if it shall prove to be a defective verdict, or as to the right of either party to object to the reception of an incomplete or an improper verdict.

Where a jury reassemble after an authorized separation, whether before or after agreeing upon a verdict, they resume at the point at which they left off, and proceed with the business before them as if no separation had taken place. Consequently, when a jury have been allowed to separate and return a sealed verdict, and upon reassembling, the verdict is found to be defective, the jury may be required to retire to their room and make the proper amendment or correction. This was expressly held to be a correct method of procedure,

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in the case of *Tyrrell v. Lockhart*, 3 Blackf. 136, and is a rule of practice applicable to criminal as well as to civil causes.

The judgment is affirmed, with costs.

Filed June 12, 1888.

115	134
126	205
127	284

No. 13,295.

CARPENTER ET AL. v. COOL.

SET-OFF.—Of Judgments.—Exemption from Execution.—In an action to set off judgments founded upon contract and obtained by the plaintiff and defendant against each other, the defendant, being a resident householder, and claiming his judgment as exempt, under section 703, R.S. 1881, may defeat the set-off by a showing that all of his property, including the judgment, is of less value than six hundred dollars; but a showing merely that the defendant is insolvent, and has no property subject to execution, is not sufficient to authorize the exemption.

From the DeKalb Circuit Court.

W. H. Dills and *G. B. Adams*, for appellants.

Howk, J.—On the 11th day of May, 1885, Isaac N. Cool, plaintiff, commenced this suit against the defendants, Herman F. Carpenter and Samuel H. Rush. Both defendants appeared and, severing in their defence, filed separate answers herein, to which plaintiff replied by general denials thereof. The issues joined were tried by the court, and, at defendants' request, the court made a special finding of facts herein, and thereon stated its conclusions of law in favor of the plaintiff. Over defendants' exceptions to its conclusions of law, the court rendered judgment thereon in plaintiff's favor for the relief demanded in his complaint.

Defendants have assigned error here (amongst others)

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which calls in question the correctness of the trial court's conclusions of law upon its special finding of facts.

The facts found by the court were substantially as follows:

1. On February 1st, 1885, defendant Rush, in the court below, recovered a judgment against plaintiff, Cool, for \$107.30, and costs taxed at \$11.10, which judgment was, on the 16th day of March, 1885, assigned by said Rush to his co-defendant, Carpenter, to be applied on a certain indebtedness of said Rush to said Carpenter, evidenced by two notes, one for \$200 and one for \$100, dated September 19th, 1884. Said judgment was then in full force and unpaid, and said Carpenter received said assignment thereof in good faith, and credited the amount of such judgment on said indebtedness of Rush to him.

2. On March 13th, 1885, said Cool commenced a suit against said Rush before a justice of the peace of DeKalb county, Indiana, upon a note and account which had been assigned to said Cool after the rendition of said judgment, in favor of said Rush and against said Cool, which case of *Cool v. Rush* resulted in a judgment in favor of said Cool and against said Rush, before said justice, on March 16th, 1885, for \$140, and costs taxed at \$4.45, which said judgment was in full force and unpaid.

3. On said 16th day of March, 1885, but before the rendition of said last described judgment, said Rush assigned his said judgment against said Cool to defendant Carpenter.

4. At the dates of both of said judgments, said Rush was "and still is" a resident householder of the State of Indiana, and was at those dates "and still is" insolvent, and had not "nor has" property subject to execution.

Upon the foregoing facts, the trial court stated its conclusion of law as follows:

"Plaintiff is entitled to the relief asked in his complaint, and to have his said judgment against defendant Rush set off against said judgment recovered by said Rush against him. (Signed) R. WES. McBRIDE, Judge."

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We are of opinion that, upon the facts found as aforesaid, the trial court did not err in its conclusion of law as above stated. It would seem from the record of this cause that defendants claimed, and attempted to show, that the judgment against the plaintiff in favor of defendant Rush was a necessary part of his exemption as a householder of this State, and that, for this reason, plaintiff could not assert any claim, legal or equitable, by way of set-off against such judgment, either as against Rush or as against his assignee and co-defendant, Carpenter.

The evidence is not in the record, and, therefore, it does not clearly appear what showing defendants made on this point; but, as against them, it may be properly assumed in the state of the record, that the court's special finding of facts herein, the substance of which we have given, was fully sustained by the evidence on the trial, without material conflict therein. We need not argue for the purpose of showing that the facts, found specially by the trial court, were wholly insufficient to sustain defendants' claim that the judgment against plaintiff in favor of said Rush was a necessary or proper part of his constitutional and statutory claim to a householder's exemption, and that such judgment was not subject to the equitable set-off which plaintiff sought to enforce against it in this suit or proceeding.

Under our law, an amount of property not exceeding in value six hundred dollars, owned by any resident householder, is not liable to sale on execution or any other final process from a court, for any debt growing out of or founded upon a contract, express or implied. Section 703, R. S. 1881. If, under this statute, the court below had found as a fact in the case in hand, in addition to the fact that Rush was a householder of this State, that his judgment against the plaintiff, Cool, and all his other property, real and personal, did not exceed in value the sum of \$600, it might well be held, we think, that the plaintiff could not maintain his claim herein

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to a set-off against such judgment, as against either of the defendants, under our previous decisions. *Puett v. Beard*, 86 Ind. 172; *Butner v. Bowser*, 104 Ind. 255; *Burdge v. Bolin*, 106 Ind. 175; *Taylor v. Duesterberg*, 109 Ind. 165; *Barnard v. Brown*, 112 Ind. 53; *Dumbould v. Rowley*, 113 Ind. 353.

But no such facts, nor any facts equivalent thereto, were found by the trial court in the case under consideration. The very utmost that was found bearing upon Rush's claim to an exemption was, that he was "insolvent" and had "no property subject to execution."

In legal acceptation, a man is insolvent who is unable to pay his debts at maturity; and he may be insolvent, and may have no property subject to execution, although at the same time he may be the owner and in the possession of thousands of dollars in good choses in action. It is certain, we think, that the court did not err in its conclusion upon the facts found that plaintiff was entitled, as against both defendants, to have his judgment against defendant Rush set off against the judgment recovered of him by Rush.

In their brief of this cause defendants' counsel ask, in the event we hold that the court did not err in its conclusion of law upon the facts specially found, that we consider also the errors assigned upon the sustaining of plaintiff's demurrers to the second paragraph of defendant Rush's separate answer, and to the third paragraph of defendant Carpenter's separate answer.

In the second paragraph of his separate answer, defendant Rush alleged that his judgment against plaintiff, Cool, was rendered upon contract, to wit, the sale of goods and personal property to said Cool by said Rush; that at the date of his recovery of such judgment against plaintiff, Cool, and of its assignment to his co-defendant, Carpenter, and since, defendant Rush was and had been a resident householder of the State of Indiana; that the entire property of defendant Rush, real and personal, within or without this State, was then and

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had been since of a less value than \$600; that both of the judgments described in plaintiff's complaint herein were rendered upon contracts, entered into since May 31st, 1879.

• In the third paragraph of the separate answer of defendant Carpenter substantially the same facts (among others) were alleged as those stated in the second paragraph of the separate answer of defendant Rush, the substance of which we have given.

Without discussing at length the questions presented by the errors predicated upon the sustaining of plaintiff's demurrers to these two paragraphs of defendants' separate answers herein, it must be held, we think, upon the authority of our previous decisions heretofore cited in this opinion, that these errors are well assigned, and that plaintiff's demurrers to each of such paragraphs of defendants' separate answers ought to have been overruled. For these errors the judgment below must be reversed. We note the fact that plaintiff's counsel have not favored this court with any brief or argument in support of the rulings and judgment of the court below.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the demurrers to the second paragraph of Rush's answer and the third paragraph of Carpenter's answer, and for further proceedings not inconsistent with this opinion.

Filed June 12, 1888.

Hollcraft v. Douglass.

No. 11,943.

HOLLCRAFT v. DOUGLASS.

115	139
120	548
115	139
126	219
115	139
147	62

SHERIFF'S SALE.—Principal and Surety.—A sale of property belonging to a surety before the property of the principal has been exhausted, as required by the judgment, is not available to defeat the sale at the suit of a third person.

SAME.—When Will not be Set Aside, Even if Void.—A sheriff's sale, whether void or voidable, under which third persons have acquired rights, will not be set aside at the suit of a judgment creditor where the latter may, by an ordinary execution, reach other property of his debtor in satisfaction of his judgment.

SAME.—Priority of Judgment Liens.—Judgments rendered against a debtor by the same court upon the same day have no priority over each other, but the person who first obtains an execution and levy secures a lien superior to that of the other judgment creditors.

SAME.—Irregularities.—Not Available to Judgment Creditor.—A sheriff's sale will not be set aside, on account of irregularities, in an action by a judgment creditor.

SAME.—Description.—Levy.—Presumption.—Where real estate has been sold and conveyed by a sheriff by a correct description, it will be presumed, in a suit by a judgment creditor to set the sale aside, the contrary not being shown, that the property was correctly described in the levy.

SAME.—Notice of Irregularities.—Innocent Purchaser.—Judgment Surety.—A surety in a judgment, who purchases the property of his principal at a sheriff's sale made upon the judgment, is not bound to take notice of irregularities in the sheriff's proceedings, and, in the absence of actual notice thereof, he is entitled to protection as a third party and innocent purchaser.

From the Clinton Circuit Court.

J. N. Sims, for appellant.

W. R. Moore, J. V. Kent and J. W. Merritt, for appellee.

ZOLLARS, J.—Hollcraft claims title to lots 3, 5 and 6 in Joseph Baum's addition to the city of Frankfort, through a sheriff's sale.

Douglass claims that that sale was and is void, and asks in his complaint that it be so declared, and that the lots be subjected to execution in satisfaction of two judgments of which he is the owner.

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So far as material here, the substance of his complaint is, that, on the 13th day of October, 1875, and at the October term of the Clinton Circuit Court, one John Shaff recovered a judgment against him and Joseph Baum; that, on the same day, said Shaff also recovered a judgment against said Baum and one Isaac D. Armstrong; that he, Douglass, and Armstrong, were sureties for Baum and were respectively so adjudged; that, on the 19th day of February, 1876, Shaff assigned the first above mentioned judgment to him, Douglass, and, on the same day, assigned the other judgment to Armstrong, who assigned it to him on the 27th day of September, 1882; that, at the time those judgments were rendered, Baum was the owner of the lots above mentioned, and that the judgments became liens thereon.

Hollcraft's counsel argues the case upon the theory that a judgment in favor of the First National Bank of Frankfort against Baum and others, and upon which his claim of title rests, was rendered at the October term, 1875, of the Clinton Circuit Court.

The argument of counsel for Douglass is upon the theory that that judgment was rendered at the October term, 1876.

The record shows upon its face that in copying the complaint into the record, the date of the judgment was first written as of the October term, 1875. A figure six seems to have been subsequently written over the figure five, thus changing the date to 1876. Doubtless, the clerk, in making up the record, made the change by some sort of mistake. To read the date as 1876, would make the complaint contradictory and inconsistent with itself. It shows by other averments that an execution was issued upon the judgment in August, 1876; that the execution was levied upon real estate, and that the real estate thus levied upon was offered for sale by the sheriff in September, 1876. Such could not have been the case, had the judgment not been rendered until October, 1876. Looking to the several averments, we must

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dispose of the case upon the theory that the bank judgment was rendered at the October term, 1875.

The substance of the complaint in relation to that judgment, then, is that at the October term, 1875, of the Clinton Circuit Court, the First National Bank of Frankfort recovered a judgment for \$1,055 against said Joseph Baum as principal, and Henry M. Baum and said Armstrong as sureties; and that, by the terms of the judgment, the property of the principal was first to be exhausted in satisfaction of the judgment; that an execution was issued on the judgment on the 25th day of August, 1876, by which the sheriff was commanded to make the amount from the property of the judgment defendants, first exhausting the property of the principal; that the sheriff levied the execution upon certain described real estate belonging to Armstrong, and upon three lots which belonged to the principal, Joseph Baum, and which were described in the levy as "lots 3, 5 and 6, in Clinton county, Indiana;" that the principal, Baum, at the time of the levy, owned other real estate of sufficient value to satisfy the execution, and that the sheriff failed to levy upon and exhaust it before taking the property of Armstrong; that the sheriff, after advertising the real estate levied upon, "as required by law," offered the same for sale on the 23d day of September, 1876, and subsequently returned the execution showing that, for the want of bidders, the property was not sold; that, on the 5th day of March, 1877, a *venditioni exponas* was issued commanding the sheriff to sell the property so levied upon, and to make the amount of the judgment and costs; that, under that writ, the sheriff made a "pretended levy" upon the same property, and again described the lots as lots "3, 5 and 6, in Clinton county, Indiana;" that, on the 31st day of March, 1877, the sheriff made a "pretended sale of the property as described above" to Henry M. Baum, "pretending to act under said writ," and executed to him a certificate of purchase; that, on the 3d day of April, 1878, said Baum assigned the certificate to

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Hollcraft; that, on the 22d day of November, 1878, the sheriff executed to Hollcraft a deed for said property, and described the lots as lots 3, 5 and 6, in Joseph Baum's addition to the city of Frankfort.

Taking all of the averments of the complaint together, the claim is that the sale was and is void, because the lots were levied upon, advertised and sold as "lots 3, 5 and 6, in Clinton county, Indiana," and not by the correct description of "lots 3, 5 and 6, in Joseph Baum's addition to the city of Frankfort;" for the reason that the sheriff levied upon and sold real property of the surety Armstrong, the principal, Baum, at the time owning real estate upon which the judgment was a lien, by the sale of which the judgment might have been made; and for the reason that the sheriff sold *in solido* the land belonging to Armstrong and Baum.

It is further averred that had each parcel been sold separately, the amount of the judgment might have been made without the sale of said lots 3, 5 and 6.

These claims, it will be seen, are not very consistent. The claim that the sale was void because property of the surety was taken before exhausting the property of the principal, is not consistent with the other claim, that, had the property of the surety been separately sold, the amount of the execution might have been made without the sale of the principal's property under execution.

. Douglass had no right to demand that the real estate of the surety should be first sold, nor has he a right to complain that it was sold before all the property of the principal was exhausted in satisfaction of the execution, if such was the case. Those are questions which concern the principal and his surety, and not Douglass.

The complaint, besides being contradictory in theory, as already stated, is infirm in other respects. The remedy which Douglass seeks is an extraordinary one, and there is nothing in the complaint to show that he might not have made, and may not now make, the amount of his judgments

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by an ordinary execution against the property of Joseph Baum, his judgment debtor. It is not shown by any averment in the complaint that he was or is insolvent, or that he has not property, real and personal, out of which the amount of the judgments held by Douglass might be made by an ordinary execution. On the contrary, it is averred that, at the time of the levy of the bank execution and the sale thereunder, he had real estate, aside from the lots in question here, upon which the bank judgment was a lien, and by the sale of which the amount of that judgment might have been made. It is not shown that the judgments held by Douglass were not, or are not, liens upon that real estate, nor that it was not, or is not, entirely sufficient to satisfy those judgments; nor yet, that it may not be reached and applied in satisfaction of those judgments by an ordinary execution.

That Joseph Baum was justly indebted to the bank, is conclusively shown by the judgment in its favor against him; that Henry M. Baum purchased the lots at sheriff's sale, and that his money was applied in satisfaction of the bank judgment, and that the certificate of purchase executed to him by the sheriff was, for a valid consideration, by him assigned to Hollcraft, is shown by other averments in the complaint. The bank debt must be assumed to have been an honest debt, and Joseph Baum is making no question as to the validity of the sale of the lots by the sheriff. The bank judgment and those held by Douglass were taken at the same term of the same court. The date of the former is not given in the complaint. For aught that is made to appear, it may have been prior in date, and hence superior as a lien upon the lots in question to the judgments held by Douglass.

The law will not sanction a resort to an extraordinary remedy for the collection of a judgment, when it may be collected by an ordinary execution, and, especially, when a resort to such extraordinary remedy will cause loss or trouble to third persons. Such is the rule with regard to proceedings

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supplementary to execution, with regard to the setting aside of fraudulent conveyances, and with regard to a proceeding for an execution against the body. *Baker v. State, ex rel.*, 109 Ind. 47, and cases there cited.

It is the rule which must be applied here, and which condemns the complaint. And that is so, whether the sheriff's sale be regarded as void or voidable merely. As already stated, the bank debt was a valid one, and, for aught that is made to appear, its judgment was the oldest and the superior lien upon the lots.

Henry M. Baum and Hollcraft have parted with their money. It was applied in payment of the bank judgment. Joseph Baum, the owner of the lots, makes no question as to the validity of the sheriff's sale, and, for aught that is made to appear, Douglass can collect the amount of his judgments from Joseph Baum by an ordinary execution, without entailing loss upon Hollcraft. The demurrer to the complaint should have been sustained.

Douglass made no better case by the proof than by his complaint. He introduced no proof showing, or tending to show, that he can not collect the amount of his judgments by an ordinary execution against the property of Joseph Baum.

The proof shows that his judgments and the bank judgment were rendered by the same court on the same day. Neither, therefore, had priority as a lien upon the real estate of the judgment defendants. So far as shown, no execution has been issued upon Douglass' judgments and levied upon the lots in question. The execution on the bank judgment, having been first issued and levied upon the lots, gave to the bank a lien superior to that in favor of the owner of the other judgments. *Elston v. Castor*, 101 Ind. 426, and cases there cited.

It is alleged in the complaint, as we have seen, that the sheriff levied upon the lots as "lots 3, 5 and 6, in Clinton

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county," but the proof does not show that the levy was so made.

As a part of the return to the execution of August 25th, 1876, the sheriff stated as follows: "I levied on the following real estate, to wit (here insert), see according to advertisement." The advertisement referred to is not set out in the record, nor is its language or substance given. We have no means, therefore, of knowing certainly what it was, in the way of describing the real estate levied upon. Presuming, as we must, in favor of the regularity of the proceedings on the part of the sheriff, we must presume that the lots in question were properly described in the levy. That presumption is strengthened here by the statements of the clerk in the second writ. In reciting in that writ the sheriff's return to the first execution, he gives the full and correct description of the lots.

In the sheriff's return to the second writ he states that he levied it upon the lots, giving the full and correct description, and that he advertised them for sale by that description for more than twenty days successively before the day of sale, by posting notices in three public places in the township in which they are situated, by a like notice at the door of the court-house, and by advertising the same for three weeks successively in a newspaper of general circulation printed and published in the county.

The fair interpretation of the return also is, that the lots were sold by the same description. They are correctly described in the sheriff's deed, and for aught that is shown they were correctly described in his certificate of sale.

We need not indicate any opinion as to the authority of the sheriff to make a second levy upon the same property under the second writ, nor as to the propriety of his so doing. It is sufficient here that it is not shown that he did not correctly describe the lots in the first levy; that he made a levy upon the lots under the second writ, in which they were

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correctly described ; that they were sold and conveyed by a correct description, and that Joseph Baum, the owner of the lots, neither before nor since the sheriff's sale, made, or has made, any question as to the regularity of the sheriff's proceedings. See *Richey v. Merritt*, 108 Ind. 347.

The sale, clearly, so far as shown, was not void, and to concede that the proceedings on the part of the sheriff were irregular would not help Douglass' case. He was a judgment creditor only. A sheriff's sale will not be overthrown on account of irregularities, in an action by such a judgment creditor. *Johnson v. Murray*, 112 Ind. 154; *Jones v. Carnahan*, 63 Ind. 229.

The court below, over Hollcraft's objection, admitted in evidence notices of the sale as published in a newspaper. In some of the publications the lots were described, not as lots 3, 5 and 6 in Joseph Baum's addition to the city of Frankfort, as they should have been, but as lots 3, 5 and 6, in Clinton county, Indiana.

If it should be conceded that that evidence was properly admitted, there was yet some notice of the sale, for there is nothing to show that it was not advertised by posting as stated by the sheriff in his return to the second writ ; and, in addition, in some of the published notices the lots were correctly described.

The evidence as to the contents of some of the published notices was, really, in contradiction of the sheriff's return. Without entering into an examination as to its competency, we feel quite sure that it was not sufficient to overthrow the title which Hollcraft has through the sheriff's sale. Neither he nor Henry M. Baum, the purchaser at the sheriff's sale, was the execution plaintiff, and, therefore, bound to take notice of irregularities in the notices of the sale, or in other proceedings by the sheriff. Henry M. Baum was a judgment debtor, as surety for Joseph Baum in the bank judgment, but that was not sufficient to bind him to take notice of irregularities in the proceedings by the sheriff, as an exe-

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cution plaintiff is bound to take notice. So far as shown, he had no actual notice of any irregularities, and, in the absence of such knowledge, he was entitled to protection as a third party and innocent purchaser. See *White v. Cronkhite*, 35 Ind. 483; *Meredith v. Chancey*, 59 Ind. 466; *Armstrong v. Jackson*, 1 Blackf. 210 (12 Am. Dec. 225); *Joyce v. First Nat'l Bank*, 62 Ind. 188; *Martin v. Prather*, 82 Ind. 535; *Mavity v. Eastridge*, 67 Ind. 211; *Jones v. Kokomo Building Ass'n*, 77 Ind. 340.

It is alleged in the complaint that a part of the real estate sold by the sheriff belonged to Armstrong, and a part to Joseph Baum, and that it was sold together and not in separate parcels, but there is nothing in the proof to support those allegations. For aught that is made to appear, all of the property sold may have belonged to Joseph Baum. Nor is it shown that the several pieces of property were sold together, without first offering each separately.

Many other questions are discussed by counsel, but we think it unnecessary to extend this opinion to decide them. It results from what we have said, that the court below not only erred in overruling the demurrer to the complaint, but also in overruling appellant's motion for a new trial.

Judgment reversed, with costs, and the cause remanded, with instructions to the court below to sustain the motion for a new trial and the demurrer to the complaint.

As appellee has died since the submission of this cause, and his heirs at law have been substituted, the judgment is reversed at their costs.

Filed June 12, 1888.

Alvey v. Reed, Guardian.

No. 13,129.

ALVEY v. REED, GUARDIAN.

MECHANIC'S LIEN.—*Infant.*—*Quieting Title.*—A mechanic's lien can not be acquired against the property of an infant, for improvements made thereon, and his guardian may maintain a suit to quiet title.

SAME.—*Estoppel of Infant.*—An infant can not be estopped from asserting his true age, nor from avoiding his contract by pleading his disability.

From the Vigo Circuit Court.

I. N. Pierce, T. W. Harper and L. Levieque, for appellant.

ELLIOTT, J.—The appellee, as the guardian of Jessie Bowser, brought this action to quiet title to land owned by his ward. It is alleged in the complaint that the appellant erected a house on the land; that, at the time the house was built, Jessie Bowser was under the age of twenty-one years; that she was the wife of James B. Myers, from whom she has since been divorced, and that the house was built under a written contract executed by Myers and his then wife.

The appellant filed a cross-complaint, wherein he alleged that, at the time the contract was executed and the house built, Jessie Myers appeared in size and development to be of full age; that she entered into a contract with the appellant to build a house on the land owned by her; that she agreed to pay him for building the house the sum of \$1,640, and that she paid him \$300, and for the remainder executed a note and mortgage; that, when the house was completed, Jessie Myers for the first time informed appellant that she was a minor, and declared that she would not pay the note and mortgage, but would repudiate them when she arrived of age; that, thereupon, the appellant filed notice of intention to hold a lien on the property; that she has wrongfully and forcibly taken possession of the house, and now has possession of it.

The cross-complaint also avers that the improvement made by the appellant will increase the value of the property to

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the amount of \$1,640, and that the work done and materials furnished by him are of the reasonable value of \$1,640.

It is further averred that at the time the contract was executed, and until after the house was completed, the appellant was ignorant that Jessie Myers was a minor, and that he believed that she was of full age.

The complaint is good. A mechanic's lien can not be acquired against the property of an infant. A lien implies a contract, and as an infant can not make a valid contract, no lien can be obtained against his property. *Price v. Jennings*, 62 Ind. 111; Phillips Mechanics' Liens, section 108.

The case made by the cross-complaint is a hard one as against the appellant, but many cases, indeed almost all cases where infants are concerned, are hard cases. We can not, much as we are impressed by the equities of the appellant, find any principle upon which we can uphold his cross-complaint. It can not be upheld on the ground of estoppel, because an infant can not be estopped from asserting his true age, nor from avoiding his contract by pleading his disability. *Carpenter v. Carpenter*, 45 Ind. 142; *Price v. Jennings*, *supra*; *Rice v. Boyer*, 108 Ind. 472; *Sims v. Everhardt*, 102 U. S. 300; Field Law of Infants, section 17.

A lien can not be enforced without enforcing a contract, since, as we have seen, the right to a lien depends entirely upon contract, and as the contracts of infants can not be enforced, the appellant has no right of action. If a right existed entirely independent of a contract, and was founded solely on a tort, it might be otherwise. *Rice v. Boyer*, *supra*, and authorities cited.

Persons who deal with infants do so at their peril, for the law interposes their non-age as a shield. If liens were allowed to prevail against infants, the result the law intends to prevent would follow, for they might be improved out of their property.

Judgment affirmed.

Filed June 12, 1888.

No. 12,987.

OUTLAND ET AL. v. BOWEN ET AL.

DEED.—Estate Tail.—Conditional Fee.—Void Limitation Over.—In 1855, B. executed a warranty deed conveying land to his granddaughter for an expressed money consideration. Following the description was written a stipulation that if the grantee should die, leaving no children, the land, or its proceeds that might be realized by sale or otherwise, should revert to the lawful heirs of the grantor; and, also, if the guardian of the grantee saw fit to sell the land, he could do so, by appropriating the proceeds of the sale to the use of the grantee while she should live, and then applying the balance, if she should die without heirs of her body, to the heirs of the grantor. The grantee died in 1883, while in possession of the land, leaving no children, but leaving a husband and mother as her only heirs at law.

Held, that the estate created in the grantee is not an estate tail, but a conditional fee, liable to be defeated only by the two contingencies, (1) that the grantee should die childless, and (2) that the grantor, prior to that event, should have died leaving lawful heirs competent to take the estate limited over.

Held, also, that as the deed disposes of the entire estate, with no reversion to the grantor, there can be no remainder, and that for this reason, and for the additional reasons that there was no person in being competent to take the conditional estate limited over, and that the deed confers upon the grantee a general power of disposition, the limitation over is void and the estate of the first taker became a fee simple absolute.

From the Wayne Circuit Court.

C. H. Burchenal, J. L. Rupe, W. A. Peelle, S. C. Whitesell and *B. F. Mason*, for appellants.

H. C. Fox and *J. F. Robbins*, for appellees.

MITCHELL, J.—On the 25th day of February, 1855, Joseph Bowen, Senior, executed a warranty deed in the common form, by which he conveyed a tract of land situate in Wayne county to his granddaughter, Rebecca Elizabeth Bowen, for the expressed consideration of eight hundred dollars.

Following the description of the premises conveyed, there was written this stipulation: "The condition of the above deed is such, that if the said Rebecca E. Bowen should die

115	150
131	208
131	283
115	150
138	393
115	150
141	176
143	375
115	150
168	172

leaving no child or children, the above described land, or its proceeds that may be realized by sale or otherwise, are to fall back to the lawful heirs of Joseph Bowen, Senior; and, also, should the guardian of the said Rebecca E. Bowen see fit to sell the above land, he can, by appropriating the proceeds of the sale to the uses of the said Rebecca E. Bowen while she may live, and then apply the balance, if she should die without heirs of her body, to the heirs of Joseph Bowen, Senior."

Subsequent to the execution of the deed, the grantee was united in marriage with the appellant, Josiah Outland, with whom she lived on the land conveyed until the year 1883, when she departed this life, leaving surviving her no child nor children. Her husband and mother survive as her only heirs at law.

The present litigation involves a controversy between those describing themselves as the lawful heirs of Joseph Bowen, deceased, grantor in the deed above mentioned, and the surviving husband and mother of Rebecca E. Bowen, concerning the title and ownership of the land conveyed by the deed of Joseph Bowen. The final determination of this controversy depends wholly upon the construction to be given to the deed, it being conceded that both parties assert title through that instrument. The inquiry is, what was the duration and quantity of the estate created in Rebecca E. Bowen, the first grantee, and was there a valid remainder or estate of any description limited over to those who now claim as the lawful heirs of the grantor?

It is contended on behalf of the appellants that the estate conveyed to the grantee named in the deed was one which, according to the rules of the common law, would have been adjudged an estate tail, and that since estates of that description have been abolished by statute in this State—section 2958, R. S. 1881, in force since May 6th, 1853—it is now to be construed a fee simple absolute. Without pausing to consider the sometimes apparently artificial refinements, or the numerous technical and ingenious distinctions of the com-

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mon law in respect to the character of estates in land, we deem it sufficient to state our general conclusion here, and that is, that the estate created by the deed in question, while in many respects bearing some analogy to an estate tail, was not one having the essential characteristics of an estate of that description. Ordinarily, an estate tail is created by a conveyance or devise in fee to some particular person, with a limitation over, in the event of the death of the person named without issue, or upon an indefinite failure of issue. The doctrine of the books seems to be, that whenever it appears in the instrument creating the estate that it was intended that the issue of the first taker should take by inheritance in a direct line, and in a regular order and course of descent, so long as his posterity should endure, and an estate in fee or in tail is given in remainder, upon an indefinite failure of issue, then the estate first created will be construed to be an estate tail. *Huxford v. Milligan*, 50 Ind. 542; *King v. Rea*, 56 Ind. 1; *Tipton v. La Rose*, 27 Ind. 484; *Shimer v. Mann*, 99 Ind. 190 (50 Am. R. 82); *Eichelberger v. Barnitz*, 9 Watts, 447; *Pott's Appeal*, 30 Pa. St. 168; 1 Leading Cases Real Property, 98.

But it is well settled on the other hand, that if it appears from the deed that the limitation over was not postponed until an indefinite failure of issue, but on failure of children only, or on failure of issue within a given time, the estate will not belong to the class known as estates tail. *Hill v. Hill*, 74 Pa. St. 173; *Nightingale v. Burrell*, 15 Pick. 104; *Allender v. Sussan*, 33 Md. 11.

The deed under consideration created in Rebecca E. Bowen an estate in fee, which was determinable, however, upon the contingency that she should die leaving no child or children. There is nothing in the deed indicative of an intention to limit or restrain the grantee, in the disposition of the estate, in the event she should leave surviving her a child or children. It left the estate to be transmitted to the child or children of the grantee, if any should survive, or to be

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disposed of by her in such other manner as she might determine, the only limitation or condition being that she leave surviving a child or children. In this respect the deed lacks an essential element in the creation of an estate tail. Moreover, it will be observed that, according to the condition in the deed, if the grantee died without leaving a child or children, it is of no consequence that she may have had children through whom she may have left grandchildren or other lineal descendants. The whole estate was granted to her in fee, but it was made to determine, by a limitation over in fee, upon the contingency of her death without leaving a child or children. Upon the happening of that event, whether soon or late, the land, or in case that had meanwhile been sold or otherwise disposed of, then the proceeds realized, were to vest in such persons, if any there could be, as might at that time occupy the relation of "lawful heirs" to the grantor. The foregoing considerations confirm our conclusion that the estate created in Rebecca E. Bowen was not one which at the common law would have been adjudged an estate tail. Of the estate created by the deed to Rebecca E. Bowen, we may say, primarily it was a fee simple, and, notwithstanding the condition subsequently written in the deed, the estate was liable to become absolute and continue perpetually in the first taker, her heirs and assigns. 1 Washb. Real Prop., pp. 61, 62. This created in her a fee simple conditional, or a fee of a determinable or conditional character. *Smith v. Hunter*, 23 Ind. 580; *Clark v. Barton*, 51 Ind. 165; *Greer v. Wilson*, 108 Ind. 322; Tiedeman Real Prop., section 26; Gray Rule against Perpetuities, section 14.

It was necessary that two contingencies should arise or exist concurrently in order that the estate created might be defeated. One was, that the grantee of the precedent estate should die without leaving a child or children surviving. The other was, that the grantor prior to that event should have died leaving lawful heirs competent to take the estate limited over. *Hennesy v. Patterson*, 85 N. Y. 91.

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The land was conveyed in fee to the first taker, and it remained uncertain until her death whether the estate conveyed would be defeated by the condition in the deed, or become absolute, and it could not be known until the death of the grantor, who would take as his lawful heirs. Since it was doubtful whether either of these contingencies would happen, the grant created a fee in the grantee, and there remained in the grantor no future estate in reversion, but only what is called a naked possibility of reverter. Tiedeman Real Prop., section 385.

In no event was the estate to revert to the grantor or his heirs so as to give them a right of re-entry as for a condition broken. The estate was to be carried over to the grantor's lawful heirs by the force and effect of the deed. The first taker's estate was, therefore, not an estate upon condition, but it was a conditional or determinable fee with a conditional limitation over. The essential difference between an estate upon condition and an estate in fee, which determines upon the happening of some future uncertain but possible event, with a limitation over, conditioned upon the happening of the event, is, that in the latter case, upon the happening of the event, the estate either reverts to the grantor or is carried by force of the deed to the person to whom it was granted; while in the former, the grantor must have either expressly or by necessary implication reserved to himself or his heirs a right of entry, upon breach of the condition, re-entry being necessary to re-vest the estate. *Attorney General v. Merrimack Manfg. Co.*, 14 Gray, 586.

"A conditional limitation is an estate limited to take effect after the determination of an estate, which in the absence of a limitation over would have been an estate upon condition. Strictly speaking, a conditional limitation can not be limited after an estate upon limitation." Tiedeman Real Prop. 281, note; 2 Washb. Real Prop. 562; *Brattle Square Church v. Grant*, 3 Gray, 142; *Miller v. Levi*, 44 N. Y. 489; *Chapin v. Harris*, 8 Allen, 594; 1 Leading Cases Real Prop

186. Concerning estates upon conditions subsequent, see *Cross v. Carson*, 8 Blackf. 138. The same case, with valuable note, 44 Am. Dec. 742 (759).

Conditional limitations were not recognized by the common law as estates capable of being created, by the same deed, with a prior estate or limitation. They could only be created so as to become valid and effectual under the statutes of uses and trusts, as shifting uses or executory devises. Tiedeman Real Prop., sections 281, 418.

The second conclusion at which we have arrived is, that the limitation over to the "lawful heirs" of the grantor in the deed in question, whether considered as a conditional limitation or as a contingent remainder, is void. It can not take effect for several reasons, some of which we proceed to state. Prior to the conveyance through which all the parties to this controversy claim title, the estate conveyed to Rebecca E. Bowen, as well as the remainder or contingent estate limited over, formed one united estate in John Bowen, Senior. The entire estate was disposed of by the deed, there being no reversion to the grantor. As we have seen, the estate created in the first taker was not an estate upon condition, with a right of re-entry reserved to the grantor or his heirs, but a determinable or conditional fee, with a conditional limitation or remainder over. There was, therefore, no reversion to the grantor or right of entry in his heirs. They can not, and do not, claim as reversioners by inheritance from their ancestor, but through his deed as remainder-men, or as the owners of an estate created by a conditional limitation. They claim to derive their title through the same instrument as that through which the heirs of Rebecca E. Bowen claim. Williams Real Prop. 250.

It must follow, therefore, if there was no estate left in the grantor after the creation of the precedent estate, vested in the first taker, he could create no remainder, as a remainder can only be created out of the estate left in the grantor after the creation of the particular estate. After the conveyance

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of an estate in fee, whether the fee be base, determinable or conditional, there is nothing in the nature of an estate in the grantor out of which to create a remainder. It has, therefore, been laid down as one of the fundamental rules in respect to the disposition of real estate, that a remainder can not be limited to take effect after a fee; or, in other words, "where there is no reversion there can be no remainder." Tiedeman Real Prop., section 398, and cases cited in note; *Huxford v. Milligan, supra.*

This rule has always been held inflexible in cases of estates created by an ordinary deed, and is applied to estates limited over, whether they be contingent remainders or conditional limitations. Gray Restraints on Alienation, section 22, and note.

Its force has been in nowise impaired or modified by section 2960, R. S. 1881, which has reference solely to the contingency upon which the remainder over shall take effect, and not to the quantity or duration of the precedent estate. It simply changes the common law rule so as to allow the remainder over to abridge the precedent estate. The only modification of the rule in this State, in respect to the power to limit one fee upon another, results from the enactment of section 2962, which, among other things, declares that "a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the person or persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such person or persons may be determined before they attain their full age." The estate limited over in the deed involved in the present case, does not come within the permission of the above statute. The first estate was a fee, and the limitation over was to take effect at an indefinite period, depending upon the event of the death of the first taker at an undefined age.

The distinction between estates in remainder, such as might be created by deed at common law, and executory interests,

such as could only be created by executory devises in wills, or by conveyances to uses by creating shifting and springing uses in deeds, is not to be lost sight of. Estates of the latter description arise when their time comes, of their own inherent strength, and, when properly created, do not depend for protection on any prior estate. *Brattle Square Church v. Grant*, *supra*; *Smith v. Hance*, 11 N. J. 244; 1 Leading Cases Real Prop. 151, 189; Williams Real Prop. 265, 283.

Except as authorized by the statute last above referred to, within the rule against perpetuities, an estate in fee can not be limited upon an estate in fee by an ordinary deed of conveyance, whether the limitation over be in the nature of a conditional limitation or a contingent remainder or use. The creation of estates of that character, requires a resort to other methods, concerning which nothing further need be said here.

The rule that a remainder in fee can not be limited to take effect after an estate in fee, is especially applicable in case the grantee of the precedent estate has, as is the fact in the present case, a general power of disposition, thereby leaving the limitation over to operate only upon what is left at the death of the first taker. In such a case, the limitation over can not take effect either as a remainder or as an executory interest. Tiedeman Real Prop., section 398, and note.

The limitation over is void for another reason. The contingency upon which the conditional limitation was to take effect was liable to happen at any moment after the execution of the deed. The grantor having granted the whole estate in fee to the first taker, without reserving any estate to himself or to any other person, it was necessary that there should have been some certain person in being in whom the contingent or conditional estate limited over could vest immediately upon the happening of the contingency which terminated the precedent estate. Sharswood's Blackstone Comm., book 2, pp. 166, 169, and note.

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The limitation over was to the "lawful heirs" of Joseph Bowen, the grantor, who was then in life. As no one can be heir to the living, it follows that there was no person in being competent to take the estate limited over. *Moore v. Littel*, 41 N. Y. 66; *Winslow v. Winslow*, 52 Ind. 8; *Lyles v. Lescher*, 108 Ind. 382.

Whether a limitation is valid or not is to be determined by the deed alone, and not by what might have happened, nor by what actually did happen. When the existing state of things at the time of its execution is disclosed, the deed must be left to speak for itself. *Bailey v. Sanger*, 108 Ind. 264.

It can not be inferred that the expression, "lawful heirs," as employed in the deed, was intended as the equivalent of children. The situation of the parties and circumstances tend to rebut such an inference.

The limitation over being void, the estate of the first taker continues unimpaired. *Leonard v. Burr*, 18 N. Y. 96. The rule applicable to such cases is, that a conveyance in fee, which, by a subsequent condition, is subject to an executory interest or limitation, which is void by reason of remoteness or on account of its being impossible or repugnant, creates an estate in the first taker which becomes vested as a fee simple absolute. *Brattle Square Church v. Grant*, *supra*; *Locke v. Barbour*, 62 Ind. 577; Gray Rule Against Perpetuities, section 250.

Another and an independent reason why the limitation over is void and of no effect is, that the deed confers upon the taker of the precedent estate a general and unlimited power of disposition. This feature of the case need not be enlarged upon. As has been remarked, the deed created primarily an estate in fee in the grantee, subject to a condition, however, that upon the happening of a certain contingency the land, "or its proceeds that may be realized by sale or otherwise, are to fall back," etc. By necessary implication this conferred the power upon, and recognized the right of,

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the grantee, on arriving at the age of twenty-one years, to dispose of the land. After conferring an unrestricted power of sale the attempt to hold on to or control the proceeds realized was futile. Whatever the intention of the grantor may have been, the power of disposition was fatal to the limitation over, the rule in such cases being that an absolute power of sale in the first taker renders a subsequent limitation over repugnant and void. *Gifford v. Choate*, 100 Mass. 343; *Hale v. Marsh*, 100 Mass. 468; *Ramsdell v. Ramsdell*, 21 Maine, 288; *Jones v. Bacon*, 68 Maine, 34; *VanGorder v. Smith*, 99 Ind. 404.

This subject was exhaustively considered and the authorities collected in *Van Horne v. Campbell*, 100 N. Y. 287.

The power in the deed under consideration being general, coupled with an ill-defined and ambiguous interest in fee, the effect of the power is to raise the estate of the first taker, and define it as a fee simple absolute. Where the estate of the first taker is certain and particularly defined, or where the power is limited and special, the power will not enlarge the estate as against a valid limitation over. Some rules must, however, be framed by which to arrive at the uncertain and ambiguously expressed intention of parties, and as absolute power of disposition and absolute ownership must, in the nature of things, be inseparably connected, the law declares that he to whom the one is given acquires the other by irresistible implication, unless the contrary clearly appears by the terms of the deed. *VanGorder v. Smith*, *supra*, and cases cited.

John v. Bradbury, 97 Ind. 263, was decided upon the facts peculiar to that case, and contains nothing opposed to the conclusion arrived at here.

It follows from the conclusions thus reached that the demurrer to the complaint should have been sustained.

The judgment is, therefore, reversed, with costs.

Filed June 12, 1888.

Spear v. Whitsett.

No. 13,274.

SPEAR v. WHITSETT.

VERDICT.—*Evidence.*—*Supreme Court.*—*Practice.*—The verdict of a jury, which has met the approval of the trial court, will not be disturbed by the Supreme Court on the evidence, unless the record shows an absolute failure of evidence on some material point.

From the Scott Circuit Court.

W. K. Marshall and *A. N. Munden*, for appellant.

C. B. Harrod, for appellee.

HOWK, J.—This was a suit by appellant, Spear, as plaintiff, against appellee, Surelda C. Whitsett and one Lemuel E. Whitsett, as defendants, on a promissory note for \$200, dated May 13th, 1884, purporting to have been executed by defendants, payable twelve months after date to the order of one Cassilda Laraway, and endorsed by her, as alleged, to plaintiff herein.

In his complaint, plaintiff averred that said note was due and wholly unpaid, and demanded judgment, etc. Summons was returned by the sheriff that defendant Lemuel E. Whitsett was “not found,” and he went out of the case. Defendant Surelda C. Whitsett appeared and answered in six paragraphs, of which the first was a general denial of the complaint; in the sixth paragraph she denied, under oath, her execution of the note in suit, and the other paragraphs of her answer were special or affirmative defences. Afterwards said defendant filed additional seventh and eighth paragraphs of her answer; and plaintiff replied by a general denial to the second, third, sixth, seventh and eighth paragraphs of defendant’s answer. The issues joined were tried by a jury, and a verdict was returned for said defendant, and thereon the court rendered judgment that plaintiff take nothing by his suit herein, and that defendant recover of him her costs taxed, etc. Plaintiff’s motion for a new trial having been

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overruled by the court, he has appealed from the judgment below to this court, and has here assigned as the only error of which he complains the overruling of his motion for such new trial.

In his motion the only causes for a new trial assigned by plaintiff were (1) that the verdict of the jury was contrary to the evidence, (2) that the verdict of the jury was not supported by the evidence, and (3) that the verdict of the jury was contrary to law and the evidence.

It is manifest from these causes for a new trial that the question, and the only question, presented for our decision by the record of this action and the error assigned thereon, may be thus stated: Is there legal evidence in the record now before us which fairly sustains, or tends to sustain, the verdict of the jury on every material point? If this question must be answered in the affirmative, as we think it must, the judgment below, under many decisions of this court, must be affirmed.

This court will not weigh the evidence, nor attempt to determine its preponderance either for or against the verdict of a jury or the finding of a trial court. The credibility of witnesses, and the proper weight to be given to the testimony of each witness, are matters for the consideration of the jury and the trial court. It may be regarded as settled by our decisions that the verdict of a jury, which has met the approval of the trial court, will not be disturbed here on the evidence merely, unless the record shows an absolute failure of evidence on some material point. *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73; *Cornelius v. Coughlin*, 86 Ind. 461; *Beck v. Bundy*, 92 Ind. 145; *Ketcham v. Barbour*, 102 Ind. 576; *Allyn v. Allyn*, 108 Ind. 327; *Campbell v. Indianapolis, etc., R. R. Co.*, 110 Ind. 490; *Kopelke v. Kopelke*, 112 Ind. 435.

In the case under consideration, defendant was a witness on the trial in her own behalf. Her testimony was clear,

positive and unequivocal, in support of two of the paragraphs of her answer, namely, (1) that the note in suit was given without any consideration whatever, and (2) her plea of *non est factum*.

If the jury believed her testimony in preference to other conflicting evidence (and this it was competent for the jury to do), it is easy to see how and why they arrived at their verdict, and it can not be correctly said that such verdict was not fairly sustained by the evidence.

Our conclusion is, therefore, that the court did not err in overruling plaintiff's motion for a new trial herein.

The judgment is affirmed, with costs.

Filed June 13, 1888.

115	169
115	596
123	123
115	169
126	494

No. 14,297.

COMMONS v. COMMONS.

WILL.—Widow.—Devise of a Living from Land.—Charge Upon Land.—Personal Liability of Devisees.—Statute of Limitations.—A testator gave to his three sons certain real estate, in fee simple. Another clause of the will provided that, after the sons became twenty-one years old, the testator's wife, if she remained a widow, should "be entitled to a living off my said land until she shall marry, and if she shall not marry, then until her death."

Held, that the widow's living is made a charge upon the land, but that it is recoverable from the rents and profits and not from the devisees personally.

Held, also, that the devisees, by accepting the land, impliedly agreed to account to the widow for such portion of the rents and profits as would amount to her living, if the land yielded so much, regardless of any other means of a living which she might have.

Held, also, that the widow is given a life-estate in the land, to the extent

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of a living at least, upon the condition that she remain unmarried. ELLIOTT, J., dissents from this conclusion.

Held, also, that a subsequent clause of the will authorizing the executors, with the widow's consent, to sell the land during the minority of the sons, for their benefit, did not overthrow her rights as previously fixed; nor did a partition of the land among the sons affect her rights.

Held, also, that the devise to the widow was not a conditional one, depending upon all the sons reaching the age of twenty-one years. That period merely fixed the time when her right to a living from the land, as against the devisees, should commence; and for such portion of the rents and profits accruing after that time as would be a living, she may recover from the devisees, except in so far as her cause of action is barred by the six year's statute of limitations.

From the Rush Circuit Court.

W. A. Cullen, for appellant.

J. B. Julian and *J. F. Julian*, for appellee.

ZOLLARS, J.—On the 27th day of July, 1831, Ezekiel Commons executed his will, which, so far as is material here, is as follows:

“*First*. It is my will that all my just debts and funeral expenses be first paid out of my personal estate.

“*Second*. I give and bequeath to my three sons, Jesse, John and Isaac D. Commons, the following described tract of land, being the south half of section numbered 9, township 15 north, of range 9 east, lying and being in Rush county, Indiana, to be equally divided amongst them according to quality and value.

“*Third*. It is my will that my three sons, Jesse, John and Isaac, in consideration of their receiving said land, do give to each of my three daughters, Eleanor, Lydia and Elbina Commons, one horse beast of the value of \$50 when my said sons shall have arrived at the age of twenty-one years.

“*Fourth*. I give and bequeath to my beloved wife, Sarah, all my personal estate, farming utensils, household and kitchen furniture, and all debts that are due to me, after the payment of my just debts and funeral expenses, for her sole use and disposal during her natural life.

“*Sixth.* It is my will that after my said sons shall have arrived to the age of twenty-one years, respectively, if my said wife shall remain a widow, she shall be entitled to a living off my said land until she shall marry, and if she shall not marry, then until her death.

“*Seventh.* It is my will that if at any time during the minority of my said sons, my executors hereinafter named, with the consent of my said wife, may deem it best for the interest of my said sons, they may sell and convey my said land for the best price they can obtain for it, dividing the money equally amongst them, or invest the money again in other lands more for the benefit of my said sons.”

The testator died in October, 1831, leaving appellee his widow, and the children named in the will surviving. Prior to the making of the will, he had purchased from one Hayworth three hundred and twenty acres of land, and had paid him for it, but had not received a deed therefor. The will was properly probated, and appellee, electing to take under its provisions, received the personal property mentioned therein. At the time of the testator's death, the sons named in the second item of the will were respectively of the ages of fourteen, six and two years, appellant being the older. In the fall of 1831, appellee moved upon the land described in the will, and so purchased from Hayworth by the testator, and continued to live thereon with her children until the land was partitioned. In 1834, Hayworth conveyed the land to the three sons by a deed with covenants of warranty, and without reservation, which deed was properly recorded. By a decree of the circuit court, the land was partitioned prior to 1849. Eighty-seven acres were set off to appellant as his share, and the balance of the three hundred and twenty acres was set off to the other two sons, John and Isaac. Appellant thereupon took possession of the land set off to him. Appellee retained possession of the land so set off to John and Isaac, they living with her. They thus lived together until 1849, when Isaac died intestate, being yet a

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minor. After his death, appellant, his mother, and his brothers and his sisters, made an amicable partition of his interest in the land, and fifty-five acres were set off to appellee. She took and held possession of the land thus set off to her until 1863, when she sold and conveyed it to appellant by a warranty deed, in consideration of \$1,200, which he paid to her. Upon the sale and conveyance to him, he took possession of the land, and still retains it, and has made valuable and lasting improvements thereon. Appellee, however, with his consent, occupied the house upon the land until 1871, when she quit housekeeping and moved from the land. For about nine years subsequently she lived with her children, dividing her time among them ; at times paying something for her board, and at other times paying nothing but her work.

The partitions above mentioned were made with appellee's knowledge and consent. From the time appellant became twenty-one years of age until within a few years past, he and appellee had frequent conversations, in which he recognized her right to a living from the land under the terms of the will, but she neither received nor demanded anything from him, nor from the land. She never personally made any demand upon him for an accounting, nor was any such demand ever made by her upon either of the other sons, both of whom are now dead ; but, on the 15th day of June, 1886, her attorney made a demand upon appellant for an accounting. For the last eight years appellee has lived with a daughter and her husband. When she went to live with them she had \$900, the proceeds of the sale of the fifty-five acres of land to appellant, and afterwards received from other sources about \$225, all of which has been received by her son-in-law and applied to her support. She was ninety-two years old in 1886. For five years prior to the trial she was quite feeble, and almost blind and helpless. During that five years it was worth seven dollars per week to board, attend to, and care for her. For three years prior thereto such

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board and care were worth four dollars per week, and for nine years prior to that her board and care were worth two dollars per week.

Upon the foregoing facts, which are, substantially, the facts specially found by the court below, that court found as conclusions of law that appellant and his brothers took the land charged with a living for appellee, their mother; that she is entitled to recover from appellant the one-third of such living during the six years preceding the commencement of the action, and fixed that amount at six hundred and seventy-six dollars. A personal judgment was rendered against appellant accordingly.

Appellee's counsel contend, in the first place, that she should have been allowed an amount equal to a living from the time that the sons became, or would have become, of age, had they all lived; and, in the second place, that if the six years' limitation is to be applied, the amount of the judgment is too small.

On the other hand, counsel for appellant contends, in the first place, that the will neither created a charge upon the land, nor a personal liability against the sons for appellee's living; and, in the second place, that if it did, she could not be entitled to a personal judgment without a demand, and that upon such demand she could only recover for the future, and not for the past.

The first question in the natural order is the scope and effect of the will. To ascertain and carry into effect the intention of the testator is a cardinal rule in the construction of wills. It is also settled, that, generally speaking, the intention must be gathered from the language of the will itself. *Millett v. Ford*, 109 Ind. 159; *Pugh v. Pugh*, 105 Ind. 552; *Downie v. Buennagel*, 94 Ind. 228; *Becker v. Becker*, 96 Ind. 154. .

And, as said in the case of *Castor v. Jones*, 86 Ind. 289 (293), "Faulty expressions and inaccurate words can not be permitted to defeat a testator's intention, if there be enough

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to disclose it; nor will detached clauses be allowed to thwart it, if it can be discovered from all the provisions taken together. The general intent, not particular phrases, controls, and this intent overrides all merely special or particular expressions. * * As some of the cases say, the intent is to be gathered 'from all the four corners of the instrument.'"

In the case before us, it is evident that the testator intended that, by the terms of the will, the three sons should become the owners of the land in fee simple. The will, therefore, should be so construed as to give effect to that intention. And in order to ascertain the rights of the several parties, the clauses of the will which clothed the sons with the fee must be construed in connection with the other clauses which fix the rights of appellee as the widow. The sixth clause very clearly secures to her a living from the land. In the absence of a will, she, as the surviving widow, and as against the children, would have been entitled to one-third of the land. Manifestly, the testator did not intend to deprive her of that right, and leave her with no means of support from the land.

What his intentions were as to the rents and profits of the land between the time of his death and the arrival of his sons at the age of twenty-one years, is left a matter of conjecture. The probability is, that he intended that the land should be used by the widow, as she seems to have used it, in the rearing of the family. However that may be, it is not material here. The evident intention of the testator was, that the mother and widow should not be left without the means of support after his sons should attain the age of twenty-one years, and hence he inserted the sixth clause of the will, that, commencing with the time when they should reach that age, she should have a living from the land. That clause can not be construed as an indication merely of that which he thought would be a reasonable exercise of discretion on the part of the sons, leaving them to exercise their own discretion.

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The sixth clause, we think, not only made her living a charge upon the land, but also gave her an interest in the land, in the way of a life-estate, to the extent of a living at least, conditioned only upon her remaining unmarried. See *Colby v. Colby*, 28 Vt. 10; *Lindsey v. Lindsey*, 45 Ind. 552; *Anderson v. Crist*, 113 Ind. 65 (12 West. Rep. 641, and note); *Springer's Appeal*, 111 Pa. St. 274; *Castor v. Jones*, *supra*; *Phillips v. Clark*, 6 Cent. R. 171; *Thompson v. Schenck*, 16 Ind. 194; *Nash v. Taylor*, 83 Ind. 347.

The seventh clause of the will authorizes a sale of the land during the minority of the sons, with the consent of appellee, the widow and mother. It is clear that the land could not have been sold under that clause without her consent, whatever might have been the effect upon her rights had such a sale been made. Construing that clause in connection with other portions of the will, it should not be held that it overthrows and destroys the widow's rights as given by the sixth clause. On the other hand, it should be treated, we think, as a recognition of the fact that she had rights of which she could not be deprived without her consent.

The devise to the widow was not, as contended by counsel, a conditional one, dependent upon all of the sons living to the age of twenty-one years. That period was fixed merely as the time when, and subsequent to which, she should have a right to a living from the land as against the devisees. *Cann v. Fidler*, 62 Ind. 116.

As we have seen, the land was partitioned amongst the sons. That partition, however, did not overthrow appellee's interest in the land, or her right to a living from it. She was not a party to the proceeding, nor was the title to the land in any way affected thereby. Interests were thereby severed, but no new titles were created, nor liens or charges destroyed. *Nash v. Taylor*, *supra*.

By the death of one of the sons, appellee became the owner of a portion of his interest in the land set off to him and his brother, but we are unable to see how that could re-

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lieve the balance of the land from the charge upon it for its proportionate share of her living.

Having determined that appellee has, by the terms of the will, an interest in the land, and that a living for her from the land is made a charge upon it, the next question is as to the personal liability of the sons to whom the land was devised. In many cases may be found the general statement that a devisee, who has accepted real estate devised to him, is personally liable for the payment of debts and legacies, or for the furnishing of support charged thereon. The only substantial and proper ground upon which a personal liability can be based is, that by accepting the real estate devised the devisee impliedly agrees to do what the testator either expressly or by a fair implication charged upon him as a personal duty, in respect to, or in consideration of, the land so devised. It was said by WALWORTH, Chancellor, in the case of *Spraker v. Van Alstyne*, 18 Wend. 200, that "the meaning of the expression, 'a charge upon the person in respect to the lands devised,' is that the devisee is directed to pay the debts or legacies personally, or to relinquish some other right, for the reason or because the testator has made the devise to him; so that if the devisee accept the devise, he impliedly assumes to pay the charge, or submit to the loss."

The proper rule in each case is to ascertain from the terms of the will what, if anything, the testator intended the devisee should do in the way of paying debts and legacies, or furnishing support, etc., and then to hold that by accepting the real estate devised, the devisee impliedly agrees to perform the duties, whatever they may be, which the testator intended to impose. In other words, the testator dictates the terms and conditions, and the devisee, by accepting the real estate devised, impliedly agrees to comply with those terms and conditions. He can not accept and hold the real estate devised and refuse to comply with the terms and conditions which accompany the devise.

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In many of the cases where the devisee has been held personally liable for the payment of debts or legacies, or for the failure to furnish support, etc., such duties were, in express terms, charged upon him personally. In others, the payment of such debts and legacies, or the furnishing of such support, was so charged upon the real estate as to show that the testator intended to impose a personal liability or duty, or to make the performance of such duty a condition of, or consideration for, the land devised. Of the first class of cases are the following: *Lindsey v. Lindsey, supra*; *Castor v. Jones, supra*; *Wilson v. Moore*, 86 Ind. 244; *Merritt v. Bucknam*, 78 Maine, 504; *Gridley v. Gridley*, 24 N. Y. 130; *McLachlan v. McLachlan*, 9 Paige, 534; *Dodge v. Manning*, 1 N. Y. 298; *Tole v. Hardy*, 6 Cow. 333; *Mahar v. O'Hara*, 4 Gilm. (Ill.) 424.

Of the second class are the following: *Cann v. Fidler, supra*; *Lofton v. Moore*, 83 Ind. 112; *Elwood v. Deifendorf*, 5 Barb. 398; *Larkin v. Mann*, 53 Barb. 267.

In support of our conclusion above, see *Bennett v. Gaddis*, 79 Ind. 347; 2 Perry Trusts, section 576.

In the case before us the will does not, in express terms, charge the devisees with the duty of furnishing to appellee a living, nor is her living made a charge upon the land in such a manner as to show, or indicate, that the testator intended that the devisees should furnish such a living. She has been, and still is, entitled to a living from the land devised, and for that living she must look to the rents and profits of the land, and not to the devisees personally. If they were personally liable for her living, they would be liable whether the rents and profits of the land would produce such a living or not. *McLachlan v. McLachlan, supra*; *Brown v. Knapp*, 79 N. Y. 136; *Tole v. Hardy, supra*. It is very evident that the testator did not intend that they should be thus liable.

From the time when the sons would have attained the age of twenty-one years, had they all lived, appellee has been

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entitled to such portion of the rents and profits of the land as would have furnished her a living; and, since the partition of the land, she has been entitled to the just proportion of that living from the rents and profits of the land held and owned by appellant. The land which he purchased from her was freed from the charge by her sale and conveyance to him, by a deed containing covenants of warranty. He is liable to her, not because he has been, or is now, personally bound to furnish her a living, or to personally contribute thereto, but because he has had the use of the land and received the rents and profits thereof. If he owns and has had the use of one-third of the land devised, as seems to be conceded by counsel on both sides, he is liable to her for one-third of an amount sufficient to have furnished her a living for six years prior to the commencement of this action, provided the rental value of his portion of the land amounted to that much. She was entitled to a portion of the rents of the land which he has received by the use of it, but he in no sense holds the amount as a trustee, and hence the six years' limitation applies. The case was commenced, tried and decided below upon the theory that appellant by the terms of the will was made personally liable for a proportionate share of appellee's living. As we have seen, that theory is not correct. There was no finding as to the rental value of the land, and, presumably, no evidence upon that question. Without such evidence it is impossible to fix the amount which appellee is entitled to recover.

The judgment is reversed, at appellee's costs, with instructions to the court below to grant a new trial, to grant leave to appellee to amend her complaint, and to proceed with the case in accordance with this opinion.

ELLIOTT, J.—I dissent from the proposition that the will devises a life estate in the land to the appellee.

Filed April 25, 1888.

ON PETITION FOR A REHEARING.

ZOLLARS, J.—It will certainly not be difficult to discover the difference between a holding that appellant was not personally liable under and by force of the terms of the will for his mother's living, which, as stated in the principal opinion, would make him liable regardless of the rents and profits of the land, and a holding which makes him personally liable by reason of having occupied a portion of the land, and received the rents and profits thereof.

Under the will appellee was, and is, entitled to a living from the land.

The special finding of facts shows that appellant, while occupying a portion of the land and receiving the rents and profits, recognized that right. He, certainly, can not complain that she claimed nothing from him on account of the rents and profits until recently. Nor can it be of any consequence, as affecting her rights, that during many years she was able or managed to live without looking to the land. She would have been entitled to a living from the land although she might have received a fortune from other sources subsequent to the death of the testator. The will unconditionally gave to her a right to a living from the land. That right was not made dependent upon the condition that she might be able to live without looking to the land, nor upon any other condition. Having a right to a living from the land, appellee might each year have demanded from appellant, who occupied one-third of it, to turn over to her an amount equal to one-third of the amount necessary for her living, provided the rental value of the land so occupied amounted to that much. That she was entitled to a living from the land he was bound to know without any notice from her. The will which lodged the fee in him was notice to him that his mother was entitled to a living from the land. The special finding, however, as we have seen, shows that he had actual knowledge of her rights, and recognized those rights in frequent conversations with her. He has occupied the

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land and received the rents and profits with the knowledge, both constructive and actual, of her rights.

The law raised an implied promise on his part to account to her for such an amount of the rents and profits of the land so occupied as would amount to one-third of her living, if the rental value of the land amounted to that much. To that extent he became indebted to her by reason of his occupancy and use of the land. *Betts v. Quick*, 114 Ind. 165.

We can think of no statute, except the six years' statute of limitations, which will bar an action for that indebtedness, and that statute, we think, applies. Suppose, for example, that during the six years immediately preceding the bringing of the action, appellee had gone in debt to some one for her living, or had borrowed money on which to live, could it be said that because she had not, each year, or at the beginning of those six years, made a demand upon appellant she could recover nothing from him with which to pay for her living, or to repay the money upon which she lived?

By failing to require appellant to account as above indicated, appellee, by reason of the statute of limitations, is limited in her right of recovery to the six years preceding the commencement of her action, but to hold that she can not recover for those years would be to destroy, in a measure, the provisions made for her by the testator.

Complaint is made that we did not, in the principal opinion, decide upon what basis the rental value of the land occupied by appellant should be estimated; as, for example, what account, if any, should be taken of the improvements which appellant may have put upon the land by way of clearing, fertilizing and otherwise, if any, which may have increased the rental value. We did not go into that question, and must decline to do so now, for the reason that the record does not so present it as to make a decision necessary or proper.

Petition for a rehearing overruled.

Filed June 13, 1888.

No. 13,150.

BINFORD v. YOUNG.

SLANDER.—*Charge of Fornication or Adultery.*—It is actionable slander to charge a woman with fornication or adultery; and where the complaint avers that the defendant stated that the plaintiff, an unmarried woman, was guilty of an act of sexual intercourse, it is good after verdict.

SAME.—*Financial Condition of Defendant.*—*Evidence.*—Evidence as to the wealth of a deceased relative of the defendant, whose heir the latter was, is competent as tending to prove the financial condition of the defendant.

SAME.—*Understanding of Hearers.*—In an action for slander, a witness may state what he understood the defendant to mean by the words he used.

SAME.—*Reputation for Chastity.*—*Admissible Hearsay Evidence.*—Where, in an action for slander, a witness states that the reputation of the plaintiff for chastity is bad, he may be required, on cross-examination, to state what he had heard that the defendant had said to others on that subject; but the defendant may then testify as to whom he spoke the slanderous words.

SAME.—*Exemplary Damages.*—*Malice.*—*Repetition of Slanderous Words.*—As exemplary damages may be awarded in actions for slander, the defendant may show, for the purpose of preventing an inference of express malice, that he did not repeat the words uttered by him to others than named persons.

EVIDENCE.—*Striking Out.*—Where a part of the testimony of a witness is competent and a part incompetent, it is not error to overrule a motion to strike out such testimony as a whole.

SAME.—*Admission in Treaty of Compromise.*—An admission of an independent fact, made in the course of a conversation relating to a compromise, but not made for the purpose of securing a compromise, is admissible in evidence.

From the Fayette Circuit Court.

B. L. Smith, W. J. Henley, C. Cambern, T. J. Newkirk and J. I. Little, for appellant.

J. A. New, J. W. Jones and E. W. Felt, for appellee.

ELLIOTT, J.—The complaint of the appellee charges the appellant with speaking and publishing of her false and slanderous words.

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115	391
123	159
115	174
132	597
115	174
135	149
115	174
150	390
115	174
168	479

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There is much in the complaint that ought not to be there, and some things should be there that are not. If it had been assailed by demurrer it might, perhaps, be our duty to declare it insufficient, but it is here attacked for the first time. An attack after verdict is governed by very different rules from those which govern attacks by demurrer. A verdict will often so aid a complaint as to prevent a successful attack, and we think the one before us is so aided.

Under our rule it is actionable slander to falsely charge a woman with fornication or adultery. *Buscher v. Scully*, 107 Ind. 246. The complaint before us does aver, although not with technical accuracy, that the appellee was guilty of an act of sexual intercourse, and that she was unmarried. This, we hold, makes the complaint good after verdict.

The testimony of Joseph O. Andrews as to the wealth of William Ladd Binford could not be relevant except upon the theory that it tended to prove that the defendant, as his surviving brother, had inherited all or part of it. As the record shows that William Ladd Binford was dead, and that the appellant was his heir, it must be deemed relevant and competent, for it at least tended to prove the financial condition of the appellant, and the financial condition of a defendant in an action for slander may be proved. But, however this may be, the objection stated by counsel is too general and indefinite to present any question to us, for it is well settled that objections to evidence must be reasonably specific. *Lake Erie, etc., R. W. Co. v. Parker*, 94 Ind. 91 (93); *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196, and cases cited.

Charges of unchaste conduct are seldom made in plain words, and it is often necessary to prove what the persons who heard the slanderous words understood the person who uttered them to mean. *Branstetter v. Dorrough*, 81 Ind. 527. In this case we are satisfied that no error was committed in permitting the witness Jacob F. Trump to state what he understood the defendant to mean by the words he used.

It is probably true that some part of the testimony of Mrs.

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Burton was incompetent, but, as the motion was to strike out all of her testimony relating to two interviews that had taken place between the plaintiff and defendant, there was no error in overruling the motion. It has often been decided that where some of the evidence is competent it is not error to overrule a motion to strike out the whole evidence although part of it may be incompetent. *City of Terre Haute v. Hudnut*, 112 Ind. 542; *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409; *Cuthrell v. Cuthrell*, 101 Ind. 375; *Wolfe v. Pugh*, 101 Ind. 293; *Elliott v. Russell*, 92 Ind. 526.

The question was presented in *Carver v. Louthain*, 38 Ind. 530, substantially as it is here, and it was held that it was not error to overrule the motion to strike out the evidence. If, therefore, we find that any material part of the testimony was competent, the ruling of the trial court must be sustained.

We think some parts of the testimony were clearly competent. Even if it be conceded that the conversation between the parties related to a compromise, still a specific admission of a fact, because it is a fact, made in the course of such a conversation, and not made to open the way to a compromise, is admissible. The rule on this subject is thus stated by the court in one of the cases referred to by the appellant: "An offer, concession, or admission, made in the course of an ineffectual treaty of compromise, and constituting, in itself, the point yielded for the sake of peace, and not because it was just or true, is not competent evidence against the party making it; but the law is otherwise with regard to an independent fact admitted to be true, but not constituting such yielded point." *Wilt v. Bird*, 7 Blackf. 258. Substantially the same language is used in *Cates v. Kellogg*, 9 Ind. 506; and in *Pattison v. Norris*, 29 Ind. 165, a somewhat broader statement is made. The rule stated governs here, for the defendant admitted, as an independent substantive fact, that he had uttered slanderous words, imputing to the plaintiff a want of chastity, and did not make the admission for the purpose of securing a compromise. The

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offer he made to pay a certain sum of money would, doubtless, have been excluded had proper objection been made, but the independent admission was competent. Under the rule heretofore stated there was no error in overruling the motion to strike out the entire testimony of the witness.

Mrs. Hill was called by the defendant and testified that the reputation of the plaintiff for chastity was bad. On cross-examination she was asked what she had heard that the defendant had said to others on that subject. We think this was a legitimate cross-examination. If the defendant himself created the alleged bad reputation of the plaintiff he ought not to be permitted to derive any benefit from testimony on that subject, since that would be to allow him to profit by evidence of his own manufacture. The jury were entitled to know who the witness had heard speak of plaintiff's reputation, and to know what part of the knowledge of the witness was ultimately attributable to reports put in circulation by the defendant. Whether he did in fact circulate such reports, and whether the alleged bad reputation of the plaintiff was founded upon the evil reports he had put in circulation, materially affected the weight and effect of the testimony on that question. One who creates by his own words a bad reputation for another can not be permitted to take advantage of his own wrong. To permit this would be to encourage the repetition of slanderous words, to the injury of the person slandered and to the prejudice of society.

The defendant's counsel having asked him while on the witness stand the appropriate question, offered to prove by him that he had never uttered the slanderous words to any other persons than the plaintiff's witnesses, Dr. Trump, Dr. Andrews, Thomas F. Hill and Micajah Young. The court excluded the evidence. In defence of this ruling, appellee's counsel say: "When the witness, Mrs. Hill, made the answer complained of, appellant objected because he claimed it

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was immaterial, and now he seeks to contradict his own witness on an immaterial matter. This he can not do." This is an insufficient defence. The questions asked Mrs. Hill were not objected to solely on the ground that they were immaterial, and we have decided, in substantial agreement with counsel's argument, that Mrs. Hill's testimony was competent, because it tended to show that the defendant had put in circulation reports which might have caused the bad reputation attributed to her. If the defendant did not utter the words to the persons of whom Mrs. Hill spoke, he was entitled to show that fact. The testimony of Mrs. Hill called out on cross-examination was hearsay, but admissible, because it tended to show that the defendant had contributed, at least, to give her the bad reputation attributed to her, and it seems clear to us that he had a right to show to whom he did speak the slanderous words. It would be unjust to allow one party to call out hearsay testimony and not permit the other to show that he did not give any foundation for it by himself repeating his slanderous charge. Nor does the testimony offered contradict Mrs. Hill. It does not show that she did not speak the truth in testifying that she heard that others had said the defendant had spoken evil of the plaintiff, for it goes no further than to show that what those others said was not true. The ruling of the court can not be sustained upon the ground taken by counsel, nor do we think it can be sustained upon any other.

The testimony of Mrs. Hill, while ostensibly directed to the question of reputation, had the effect to make it appear that the defendant had aggravated his wrong by repeating his words. This testimony, in all its forms, he had a right to meet and explain by his own statements. If, in truth, he did not repeat his words he had a right to show that fact.

There is still another phase of the question deserving consideration. It is the rule in actions for slander that exemplary damages may be awarded, and, in awarding them, jurors are influenced by matters of aggravation, as well as

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by matters indicating express malice, and repetition of slanderous words may tend to impress the jurors that there was express malice, and thus augment the damages. We think it clear that the defendant had a right to show, for the purpose of preventing an inference of express malice, that he did not repeat the words. Of course, the fact that he did not repeat the words would not relieve him from the imputation of malice, but it might prevent the jury from increasing the damages on the theory that by repeating the words he increased the injury as well as indicated a great degree of malice.

Irrespective of the effect of the testimony of Mrs. Hill, the testimony of the defendant was competent, as it seems to us, and when what she testified to on cross-examination is taken into consideration, the conclusion that it would be a denial of justice to refuse the defendant the right to show that he did not speak the slanderous words to others than the witnesses called by the plaintiff seems to us to necessarily result. To compel him to remain silent under such circumstances would be to hold him responsible for reports that he had not put in circulation. It is only upon the theory that he did aid in creating the bad reputation of plaintiff that it is possible to sustain the ruling admitting the testimony of Mrs. Hill, and, surely, the defendant must have a right to show that he did not aid in creating that reputation, by proving that he did not utter the words to any persons other than the witnesses introduced by the plaintiff. If he does not have this right, then he must be held accountable for the words of others, although he did nothing to justify them.

We can not avoid the conclusion that the court erred in excluding the testimony of the appellant upon the point under immediate mention.

Judgment reversed.

Filed March 22, 1888; petition for a rehearing overruled May 18, 1888.

Duesterberg, Executor, v. Swartzel *et al.*

No. 14,292.

DUESTERBERG, EXECUTOR, v. SWARTZEL ET AL.

PLEADING.—*Practice.*—*Assignment of Error.*—A defendant can not assign available error upon the sustaining of a demurrer filed by another defendant to the plaintiff's complaint.

SHERIFF'S SALE.—*Junior Liens.*—*Redemption.*—*Deed.*—*Merger.*—In a suit to foreclose a mortgage the holders of junior judgment liens were made parties defendants. At a valid sale under the decree of foreclosure, S. purchased the mortgaged property and received a certificate of sale. Before the year for redemption expired, S. also purchased from the mortgagors their equity of redemption, received a quitclaim deed from them, and went into possession. The junior lien-holders seek to enforce their liens without redeeming from the sheriff's sale.

Held, that the only right of the junior lien-holders was to redeem within the time allowed for that purpose.

Held, also, that the title acquired by S. through the sheriff's deed related back to the date of the sale and vested in him as of that date, and hence was not merged in the title acquired under his quitclaim deed from the mortgagors.

From the Knox Circuit Court.

W. A. Cullop and G. W. Shaw, for appellant.

S. W. Williams and B. M. Willoughby, for appellees.

Howk, J.—In this case Gerard H. Duesterberg, executor of the will of Louis Stolpp, deceased, sued Joseph A. and Mary A. Swartzel, Lizzie M. Dove and Benjamin R. Pegram, as defendants, in a complaint of two paragraphs. The separate demurrers of defendants Dove and Joseph A. Swartzel to each paragraph of plaintiff's complaint, for the alleged insufficiency of the facts therein stated to constitute a cause of action, were severally overruled by the court to the first paragraph, and sustained by the court to the second paragraph, of such complaint.

Defendant Pegram filed his separate answer to the first paragraph of plaintiff's complaint, and, also, his cross-complaint against his co-defendants herein, who appeared to such

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cross-complaint and were ordered to answer it. Defendants Swartzel, Swartzel and Dove filed their answer to the first paragraph of plaintiff's complaint, and plaintiff was ruled to reply. The cause was tried by the court, and a finding was made for the defendants, and judgment was rendered accordingly.

The only errors assigned here by plaintiff call in question the sustaining of the separate demurrers of appellees Joseph A. Swartzel and Lizzie M. Dove to the second paragraph of plaintiff's complaint. By a separate assignment, defendant Pegram also says that the court below erred in sustaining such demurrers to the second paragraph of plaintiff's complaint. But as such second paragraph was not the complaint of Pegram, we can not see how it concerns him whether the court did, or did not, err in sustaining demurrers to such paragraph of plaintiff's complaint; or, if the rulings were erroneous, upon what ground defendant Pegram could claim that he was injured by such errors.

In the second paragraph of his complaint, plaintiff alleged that on the 15th day of November, 1886, in a certain cause in the court below, in which he, as such executor as aforesaid, was plaintiff, and one Joseph A. Pollock was defendant, by the consideration of such court the plaintiff recovered a judgment against said Pollock for the sum of \$1,021.40, with six per cent. interest thereon, and costs of suit taxed at — dollars; that at the time of the rendition of such judgment said Joseph A. Pollock was the owner in fee simple of the real estate in Knox county, Indiana, described as lots numbered 164, 165, 166 and 167, in Harrison's addition to the city of Vincennes, then and since of the value of \$12,000; that prior to the rendition of said judgment said Joseph A. Pollock and his wife, Evaline A. Pollock, executed a mortgage on all of said real estate to Joseph L. Bayard, John H. Robb and Louis L. Watson for the sum of \$5,900; that at the February term, 1887, of such court, said Bayard, Robb and Watson brought an action against said Pollock and wife

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to foreclose said mortgage, and made defendants thereto plaintiff herein in his trust capacity as executor of the will of Louis Stolpp, deceased, and said Benjamin R. Pegram, defendant herein, alleging the junior lien of this plaintiff by virtue of his said judgment, and a junior lien in favor of said Pegram by virtue of a judgment in such court recovered by said Pegram of said Joseph A. Pollock, and asking that this plaintiff and said Pegram be required to answer as to whatever claim to or interest in said real estate they respectively had, or claimed to have; that this plaintiff and said Pegram appeared to said action in such court, and filed answers and cross-complaints therein against said Pollock and wife, plaintiff herein setting up his aforesaid judgment lien; that issues were joined between all the parties to said action, and such proceedings were had therein that the court below, at its ——— term, 1887, found and adjudged that there was due said Bayard, Robb and Watson, on account of their said mortgage lien, the sum of \$5,797; that there was due plaintiff herein, executor as aforesaid, on his said judgment lien, the sum of \$1,137.97; that there was due said Pegram, on account of his said judgment, the sum of \$115.96; all of which sums were due from said Pollock, and were liens on the aforesaid real estate; that it was decreed in said action that said real estate should be sold to satisfy said judgments, and that the proceeds of such sale should be applied, *first*, to the payment of the lien of said Bayard, Robb and Watson; *secondly*, to Evaline Pollock, wife of said Joseph A. Pollock, by reason of her marital rights, whatever portion of her one-third remained, if any, in excess of what was necessary to satisfy said mortgage lien; *thirdly*, the remainder, first, to the plaintiff herein on his said judgment lien, and next to said Pegram on his judgment lien; and *fourthly*, the surplus, if any, to said Joseph A. Pollock.

And plaintiff further said, that, pursuant to said judgment and decree, an order of sale thereon was issued to the sheriff of Knox county, commanding him to sell said real estate as pro-

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vided in said decree; that, on the — day of —, 1887, pursuant to said decree, said sheriff offered and sold said real estate for the sum of \$5,945 to defendant Joseph A. Swartzel, who, at the time of such sale, paid said purchase-money, and received from such sheriff a certificate of sale pursuant thereto, entitling him to a deed for said real estate on the — day of —, 1888, if the same was not sooner redeemed from such sale. And plaintiff averred that immediately after such sheriff's sale, and before the expiration of the year for redemption, defendant Joseph A. Swartzel, to wit, on the 20th day of April, 1887, purchased of said Pollock all of said real estate, and, pursuant to such sale, by their quitclaim deed of that date, Pollock and his wife conveyed to said Swartzel said real estate, whereof the fee was then in said Pollock; that, at the time of such sale, said real estate was of the value of \$12,000, and the equity of redemption was worth \$2,000; that said Swartzel paid said Pollock for the fee of such real estate the sum of \$500, and took said conveyance for the purpose of preventing redemption either by said Pollock or by his wife; that, in arriving at the amount said Swartzel should and did pay for such real estate, he and said Swartzel took into consideration plaintiff's judgment lien thereon, recognizing the same as a valid lien on such real estate, which was subject to execution to satisfy plaintiff's judgment the same as if said Pollock had redeemed the real estate from the sheriff's sale thereof instead of conveying the same in fee to said Swartzel; that immediately after the sale and conveyance of such real estate by Pollock and his wife to said Swartzel, the latter took and had since retained possession of the property, the rental value of which was \$50 per month; that said Mary A. was the wife of said Joseph A. Swartzel, and said Lizzie M. Dove had, or claimed to have, some interest in such real estate, or some part thereof; and that plaintiff's judgment was unpaid, and, by virtue thereof, he had a lien on said real

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estate prior to any lien, claim or interest thereon or therein of the defendants and each of them. Wherefore, etc.

We are of opinion that the court below committed no error in sustaining the separate demurrers of defendants Joseph A. Swartzel and Lizzie M. Dove to the second paragraph of plaintiff's complaint. The facts stated in such paragraph were wholly insufficient to show any cause or right of action in favor of the plaintiff against such defendants, or either of them, or against the real estate described in such paragraph. It is not claimed by plaintiff that the judgment and decree of the court for the sale of such real estate, to which he was a party, were invalid and void for any reason. Nor does plaintiff claim in the second paragraph of his complaint that the sheriff's sale of such real estate to defendant Joseph A. Swartzel, pursuant to such decree, was for any cause illegal, invalid or inoperative in any respect or particular. By his purchase of such real estate at sheriff's sale, pursuant to such decree, defendant Joseph A. Swartzel acquired all the right, title and estate of both Pollock and his wife in and to such property, subject, of course, to the right of each of them to redeem the same from such sale thereof at any time within one year from the date of the sale, and subject, also, to the right of said Pollock, as owner of the real estate sold as aforesaid, under the provisions of section 767, R. S. 1881, to retain "the possession of the same for one year from the date of such sale." By the sheriff's sale of such real estate, said Joseph A. Swartzel as purchaser thereof took the same freed and discharged from the lien of the judgments of the plaintiff herein and of the defendant Benjamin R. Pegram, and each of them, on such real estate, and subject only so far as they are concerned to the right of each of them to redeem the property from such sale thereof at any time within one year from the date of such sale.

After defendant Swartzel became the purchaser of such real estate at sheriff's sale, and had received from the sheriff

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a certificate of his purchase, he had an undoubted right, we think, to purchase from said Pollock and his wife any interest which they, or either of them, yet claimed in such real estate, possessory or otherwise, upon such terms as he and they could agree upon. The fact that Swartzel made such purchase from Pollock and his wife, after the date of such sheriff's sale, or the further fact alleged that said Pollock and his wife conveyed by quitclaim deed the fee of such real estate and surrendered the possession thereof to said Swartzel, after such sheriff's sale, did not and could not deprive the plaintiff herein or the defendant Pegram of his legal right to redeem such real estate from the sheriff's sale thereof to said Swartzel, at any time within one year from the date of such sale; and this right of redemption was all the right in or to such real estate which the plaintiff or Pegram had, after the date of such sheriff's sale thereof. If such real estate was not redeemed from such sheriff's sale within the year allowed by law for such redemption, and if, at the expiration of such year, there was no such redemption, and a sheriff's deed was then executed pursuant to such decree and sale conveying to said Swartzel the above described real estate, the legal title of Pollock to such real estate, and the inchoate interest of his wife therein, under our law, became absolute and vested in said Swartzel as of the date of the sheriff's sale, and not as of the date of the sheriff's deed to him of such real estate. *Hollenback v. Blackmore*, 70 Ind. 234; *Elliott v. Cale*, 80 Ind. 285; *Wilhelm v. Humphries*, 97 Ind. 520; *Elliott v. Cale*, 113 Ind. 383.

In that view of the case, the claim of plaintiff that the title acquired by Swartzel, under the sheriff's sale and deed to him, had become merged in the title he acquired under his quitclaim deed from Pollock and wife, is wholly untenable and can not be sustained. The sheriff's sale and deed would give Swartzel a much better title to the real estate than he could possibly get under his deed from Pollock and wife; for, under the former deed, he would get the

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real estate free from the lien of the judgments of plaintiff or of Pegram thereon. In such case, if there were any merger of titles, Swartzel's title under his quitclaim deed from Pollock and wife would be merged in his older and better title under the sheriff's sale and deed of said real estate.

The demurrers to the second paragraph of complaint were correctly sustained.

The judgment is affirmed, with costs.

Filed May 18, 1888.

115 186
120 335

115 186
155 155

115 186
168 172

No. 13,246.

TOWER, ADMINISTRATOR, v. HARTFORD ET AL.

WILL.—Personal Property.—Power of Disposition.—Widow.—Promissory Note.

—A testator gave his personal property to his wife, directing that what should be left undisposed of at her death should descend to his son. The widow loaned money received from her husband's estate and took a note, which she assigned without consideration. She afterwards died. The testator's administrator claims the note as part of the assets of the testator's estate.

Held, that the will at least gave to the widow an absolute power of disposition, which has been effectually exercised, and that the administrator is not entitled to the note.

From the Switzerland Circuit Court.

J. D. Works, L. O. Schroeder and W. R. Johnston, for appellant.

J. B. McCrellis and G. S. Pleasants, for appellees.

ELLIOTT, J.—The appellant, as the administrator with the

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will annexed of Robert Stearman, claims a promissory note executed by Philip T. Hartford to Ealy A. Howard, for money borrowed of her.

Mrs. Howard was the wife of the testator at the time of his death. Subsequently she became the wife of William Howard, and has since died. She received the money which she loaned to Hartford from the estate of her first husband, Robert Stearman. The note was taken by her in her individual name, and was subsequently assigned by her to Morton D. Thiebaud, but she received no consideration from him for the assignment. The right to the note is claimed by the appellant upon the theory that it became part of the assets of the decedent's estate, and that the will of the decedent gave to the widow of the testator only a life interest in the personal property of her husband, without the absolute power of disposition. The appellees contend that the will at least vested in the widow the absolute power of disposition, if it did not give her the absolute ownership of the property.

The material provisions of the will are these:

"Item 3d. I give and devise to my beloved wife, Ealy A. Stearman, all the residue of my property, rights, credits or choses in action of every kind that I may own or be entitled to at the time of my decease.

"Item 4th. I further direct that whatever property is left undisposed of at the death of my wife shall descend to my son, George Stearman, and in case of his death then to my grandson, William Stearman."

The will, at least, gave to the testator's widow an absolute power of disposition, if it did not do more, and the administrator has no right to the note in controversy. *Van Gorder v. Smith*, 99 Ind. 404, and cases cited; *Allen v. Craft*, 109 Ind. 476; *Fullenwider v. Watson*, 113 Ind. 18, and authorities cited.

Even if the will gave the widow no more than a life interest, with a power of disposition, the power was effectually

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exercised without referring to the will. *South v. South*, 91 Ind. 221 (46 Am. Rep. 591); *Downie v. Buennagel*, 94 Ind. 228; *Silvers v. Canary*, 109 Ind. 267.

Judgment affirmed.

Filed June 13, 1888.

No. 14,380.

TORR, AUDITOR, v. THE STATE, EX REL. CORCORAN.

COUNTY COMMISSIONERS.—*Special Session*.—*Adjourning to a Day in Vacation*.—The board of county commissioners can not lawfully convene itself in special session by an order adjourning over beyond the term to a day in vacation.

SAME.—*Collateral Attack Upon Proceedings*.—*Presumption*.—Where the record, by a recital to that effect, shows that the board met in what was assumed to be a special session, and transacted business which it was authorized by law to transact at such session, it will be presumed, when its proceedings are collaterally assailed, that it was regularly called in special session.

From the Cass Circuit Court.

J. W. McGreevy, for appellant.

D. D. Dykeman, W. T. Wilson and G. C. Taber, for appellee.

MITCHELL, J.—This was a proceeding by mandamus to compel Torr, auditor of Cass county, to issue his warrant upon the county treasurer to Michael Corcoran for fifty dollars, the county surveyor having certified that that sum was due the latter on account of labor performed and services rendered in cleaning out and repairing a public ditch, under

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a contract with the surveyor. The facts were agreed upon, and, having given due consideration to the agreed statement of facts, the court below gave judgment directing the auditor to draw his warrant for the sum certified to be due the relator.

Section 10 of the act of April 6th, 1885, makes it the duty of the county surveyor, in each county, to keep all works constructed for the purpose of drainage, under any law then or theretofore in existence, in repair, and to certify the cost thereof, including his own *per diem*, to the county auditor, who is required by law to draw his warrant on the county treasurer, payable to the person to whom the money is owing.

It is agreed that the work was done in pursuance of the order of the county surveyor, under a contract for the repair of a drain; that it was of the value of fifty dollars, and that the ditch cleaned out and repaired was an existing ditch, in Cass county.

The auditor seeks to justify his conduct in refusing to draw a warrant upon the certificate of the county surveyor, by maintaining that the ditch which the relator repaired was never legally established, or, in other words, that the proceedings under which the ditch repaired was established and constructed were void.

It is agreed that the board of commissioners of Cass county, assuming to be in special session, with a proper petition before it, appointed viewers to locate and report upon the public utility of the ditch in question, on the 15th day of September, 1876.

The appellant insists that the order appointing viewers was a nullity, because the record of the proceedings of the board does not show "the service of any summons or notice on said board nor a majority thereof, to meet in said special session at the time aforesaid, and that no such notice or summons can, after careful and diligent search therefor, be found on file in the office of the auditor of Cass county, Indiana,

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where all such summonses are kept on file." There is no merit in the point thus made.

It is agreed that the regular September session of the board expired by limitation of law on the 13th day of September. It is recited at the end of the commissioners' record of the proceedings of that day, that the board adjourned to meet in special session at 9 o'clock the next morning. The record of the proceedings of the next day commenced thus: "The board met in special session to complete the unfinished business of the regular session." The business not having been completed that day, the board adjourned to meet on the morning of the 15th, the day on which the viewers were appointed.

The appellant assumes, because the record of the commissioners' meeting on the 14th omits to show the issuing and service of notice upon the members of the board to meet in special session, that it necessarily and conclusively follows that the board must be presumed to have met on the 14th of September pursuant to its own adjournment on the 13th, without any call or summons from the auditor. As a matter of course, a board of commissioners must be lawfully in session in order to do any valid official business, and it can not lawfully convene itself in special session by an order adjourning over beyond the term to a day in vacation. But the law makes provision for the calling of special sessions, and it authorizes proceedings to be taken at such sessions in matters pertaining to the establishment of drains. When, therefore, the record, by a recital to that effect, shows that the board met in what was assumed to be a special session, and transacted business which it was expressly authorized by law to transact at such a session, the presumption will be indulged, when its proceedings are assailed collaterally, that it was regularly called in special session. This subject has so recently been considered by this court that we do not deem it necessary to elaborate further. *Prezinger v.*

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Harness, 114 Ind. 491; *White v. Fleming*, 114 Ind. 560; *Davis v. Lake Shore, etc., R. W. Co.*, 114 Ind. 364.

It may be well enough to remark that it appeared by extraneous evidence in the present case that the commissioners were regularly called into special session by the auditor. Whether a record which recited that the commissioners had been convened in special session could be collaterally impeached, we do not now inquire. It was certainly not reversible error for the court to consider such evidence, if it did consider it, in support of a record that was sufficient against a collateral attack without extraneous proof.

The judgment is affirmed, with costs.

Filed June 13, 1888.

115	191
123	209
115	191
157	40

No. 13,734.

HADLEY v. THE WESTERN UNION TELEGRAPH COMPANY.

TELEGRAPH COMPANY.—Negligence.—Statutory Penalty.—Special Damages.—

Section 4176, R. S. 1881, relating to telegraph companies, having been repealed by the act of 1885 (Acts of 1885, p. 151), the fixed penalty prescribed therein for a merely negligent breach of duty in the transmission of messages is no longer recoverable; but such companies are still liable under section 4177, and also upon common law principles, for special damages.

SAME.—Who May Maintain Action.—It is only the sender of a dispatch who occupies that privity of contract with or relation to the telegraph company which is necessary to the maintenance of a suit for the statutory penalty, and this rule is not changed by the phrase "any party aggrieved," as used in the act of 1885; but as to special damages a different rule prevails, and an action may be maintained therefor by the person to whom the message is sent.

SAME.—Construction of Statute.—In the construction of a statute authoriz-

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ing the recovery of a penalty, a strict interpretation ought to be given to its provisions, and, in such a case, as in others where the meaning is obscure, a resort may be had to previous legislation on the same subject. **SAME.—Sale of Cattle.—Failure to Deliver Message.—Recovery for Loss of Weight.**—Where one has sold cattle for future delivery, at the option of the purchaser, and the latter sends a dispatch notifying him that he will take the cattle in the morning of the next day, in pursuance of a custom among stock dealers to take and weigh cattle at early daylight, which dispatch the telegraph company fails to deliver promptly, whereby the weighing of the cattle is delayed and their weight decreased, the seller may recover for the loss of weight so resulting from the company's negligence.

From the Hendricks Circuit Court.

E. G. Hogate, R. B. Blake and G. C. Harvey, for appellant.
J. E. McDonald, J. M. Butler, A. L. Mason, A. H. Snow
and *A. J. Beveridge*, for appellee.

NIBLACK, J.—Henry Hadley brought this action against the Western Union Telegraph Company to recover the statutory penalty, and additional and special damages, for the alleged failure of the company to transmit as well as to deliver a telegraphic message within proper time. The complaint was in two paragraphs.

The first demanded the prescribed penalty of one hundred dollars for a failure to transmit the message with the requisite promptitude, and the second demanded special damages in the sum of five hundred dollars for a failure to deliver the message within time to serve the purposes for which it was intended, alleging the particular facts relied upon to sustain such a demand.

A jury was empanelled to try the cause, and, being instructed so to do, they returned a special verdict, stating the facts as they found them from the evidence.

Hadley thereupon moved for judgment on the first paragraph of the complaint for the sum of \$100, and on the second paragraph for the sum of \$16.80, the amount of damages conditionally assessed by the jury, but the court over-

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ruled his motion, and instead rendered judgment in favor of the telegraph company.

Questions were reserved below, and are again made here, upon the sufficiency of both paragraphs of the complaint, and that of certain paragraphs of the answer, but the real merits of the controversy are better presented by the special verdict. We, therefore, consider it unnecessary to make any formal rulings upon the pleadings.

The special verdict was as follows: "We, the jury, do make and return the following special verdict in this case: On the 14th day of October, 1886, and for a long time prior to that date, and continuously from that time to the present, the defendant, the Western Union Telegraph Company, was, and has been, an electric telegraph company, duly organized as a corporation and engaged in transmitting telegraphic messages for the public for hire. During all that time the defendant was the owner and operator of a line of telegraph wires extending to and through each of the towns of North Salem and Danville, in Hendricks county, in the State of Indiana, in each of which said towns said defendant had a public office for the accommodation of the public in transmitting telegraphic messages. On said 14th day of October, 1886, one Samuel C. Clay placed in the hands of the defendant's agent at said North Salem office, during the usual office hours thereof, a message notifying the plaintiff that said Clay would take and receive certain cattle which he had before that time purchased of the plaintiff, and for the plaintiff to meet him at the pasture early next morning for that purpose, which message was in the words and figures following, to wit:

‘NORTH SALEM, INDIANA, Oct. 14th, 1886.

‘*To Henry Hadley, Danville, Indiana:*

‘Want your cattle in the morning; meet me at pasture.

‘S. C. CLAY.’

“That said message the defendant then and there undertook

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and agreed to transmit to said Henry Hadley at Danville, Indiana, the said Clay having then and there paid in advance the usual fee, to wit, the sum of twenty-five cents for the transmission of said message, the full amount demanded of him by said agent on that account. Said agent did not transmit, and the agents of the defendant at Danville, Indiana, did not receive said message for the space of one and one-half hours after it was left by said Clay at said defendant's North Salem office for transmission. Said message was received by the defendant's agent at its said Danville office during the defendant's usual office hours at that place, and, although the plaintiff resided within less than one mile of said office, the defendant's agents at said office, in bad faith, refused to deliver said message to the plaintiff for the space of ten hours, although they were, during all that time, present at said office for the purpose of performing such duties. In thus failing and refusing to deliver said message to the plaintiff, after it was received at said Danville office, the defendant and its agents were guilty of partiality, bad faith and discrimination against the plaintiff in this, to wit, that, at the time of sending said message as aforesaid, as well as long before and long after that time, it was the custom and practice at said Danville office of the defendant and its agents to deliver to its patrons at that point, and to the public generally, like messages to that above mentioned during all the like hours and times that said message lay in said Danville office undelivered to said Hadley as aforesaid.

“At the defendant's Danville office, at the time the message in question was sent, and both before and after that time, it was the practice of Horace Goodwin, during all the hours of the night, to receive and transmit messages over the lines of the defendant to its distant offices, and to receive messages over its lines at said Danville office from its offices at distant points, and to receive and collect the tolls and fees for the transmission of such messages, and account to the defendant or its agents.

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“ On said 14th day of October, 1886, the plaintiff was the owner of a farm near the town of North Salem, on which he was then and there feeding and grazing a large drove of cattle which he had before that time sold to the said Samuel C. Clay, to be delivered between the 14th and 31st days of October, 1886, at the option of said Clay. Said message was designed by said Clay to notify said Hadley that he, said Clay, would weigh and take said cattle on the morning of the 15th of said month, and the defendant, by its agreement to transmit said message as aforesaid, undertook to notify said Hadley of the option of said Clay to take them at that time. Owing to the wrongful and negligent failure of the defendant to deliver said message promptly, and without delay, as above set forth, the plaintiff received no information whatever of said Clay's election to take said cattle as aforesaid, until 7 o'clock A. M. of said 15th day of October, 1886. At that date, as well as long before and after that time, it was the invariable rule and custom among cattle buyers and sellers throughout said county, and in the neighborhood and vicinity of both said offices of the defendant, to take and weigh cattle sold as above mentioned, at an early daylight in the morning of the day named for the delivery. In pursuance of said rule and custom, and the terms of his contract, the said Clay, by his agent, at daylight on the morning of the 15th day of October, 1886, went to the pasture of the said Hadley and took and weighed and drove away said cattle, the said Hadley not being present either in person or by agent. If said Hadley had received said message before the weighing of said cattle, or if he had received any information from any other source, that they were to be so weighed, he would have been present in person to superintend said weighing and delivery. In the process of weighing and taking of said cattle by said Clay, as aforesaid, and without any fault or negligence on the part of said Clay, said cattle were delayed and detained in the public highway for the space of thirty or forty minutes before they were weighed, on account

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of the absence of the plaintiff, for whom the agent of said Clay was waiting; by which delay and detention as aforesaid, said cattle were decreased in weight to the amount of four hundred and twenty pounds, and, in value, to the amount of \$16.80. If the court, upon the facts set forth in the special verdict, should be of the opinion that the law is with the plaintiff, then we find for the plaintiff, and assess his damages at the sum of \$16.80; but if the court should consider that the law is for the defendant, then we find for the defendant."

The act of 1852, section 4176, R. S. 1881, provided that telegraph companies, engaged in telegraphing for the public, should, during the usual office hours, receive dispatches, and, on payment or tender of the usual charge, "transmit the same with impartiality and good faith, and in the order of time in which they are (were) received, under penalty, in case of failure to transmit, or if postponed out of such order, of one hundred dollars, to be recovered by the person whose dispatch is (was) neglected or postponed."

The act of 1885, covering the same subject-matter, is as follows: "Section 1. That every telegraph company with a line of wires wholly or partly within this State, and engaged in doing a general telegraphic business, shall during the usual office hours receive dispatches, whether from other telegraph lines, or other companies, or individuals, and shall, upon the usual terms, transmit the same with impartiality and in good faith, and in the order of time in which they are received, and shall in no manner discriminate in rates charged, or words or figures charged for, or manner or conditions of service, between any of its patrons, but shall serve individuals, corporations and other telegraphic companies with impartiality: *Provided, however,* That arrangements may be made with the publishers of newspapers for transmission of intelligence of general public interest out its order, and that communications for and from officers of justice shall have precedence of all others."

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The second section contains kindred provisions concerning telephone companies.

The third section declares that "Any person or company violating any of the provisions of this act shall be liable to any party aggrieved in a penalty of one hundred dollars for each offence, to be recovered in a civil action in any court of competent jurisdiction." Acts of 1885, p. 151.

It was held in the cases of *Western Union Tel. Co. v. Steele*, 108 Ind. 163, and *Western Union Tel. Co. v. Brown*, 108 Ind. 538, that this act of 1885 repealed section 4176, R. S. 1881, first above referred to, and that telegraph companies are no longer liable to a fixed penalty of one hundred dollars for a merely negligent breach of duty either in the transmission of, or in the failure to transmit, telegraphic messages. This construction of the act of 1885 was reaffirmed in the more recent case of *Western Union Tel. Co. v. Swain*, 109 Ind. 405, and is one to which we feel constrained to adhere. Telegraph companies are, nevertheless, liable under section 4177, R. S. 1881, which remains in force, as well as upon the general principles of the common law, for special damages for failure or negligence in receiving, copying, transmitting or delivering dispatches. *Western Union Tel. Co. v. Ward*, 23 Ind. 377 (85 Am. Dec. 462); *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495; *Western Union Tel. Co. v. Lewelling*, 58 Ind. 367; *Western Union Tel. Co. v. Lindley*, 62 Ind. 371; *Western Union Tel. Co. v. Trissal*, 98 Ind. 566; *Western Union Tel. Co. v. McDaniel*, 103 Ind. 294.

So far as we are at present advised, this court has uniformly ruled that it was only the sender of a telegraphic dispatch who could recover the fixed penalty prescribed by section 4176, *supra*, for a violation of its provisions, and, in argument, the correctness of these rulings is conceded. See *Western Union Tel. Co. v. Brown*, *supra*.

But it is now sought to be maintained that, under the act

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of 1885, the right to sue for and recover the fixed penalty is not restricted to the sender of the dispatch, but that the phrase "any party aggrieved," is broad enough to include as well the person to whom, or corporation to which, the dispatch is directed, when aggrieved by a non-compliance with the requirements of that act.

In the construction of a statute authorizing the recovery of a penalty, a strict, rather than liberal, interpretation ought to be given to its provisions, and, in such a case, as in others where the meaning is seemingly obscure, a resort may be had to previous legislation on the same subject. *Western Union Tel. Co. v. Axtell*, 69 Ind. 199; *Western Union Tel. Co. v. Roberts*, 87 Ind. 377; *Western Union Tel. Co. v. Mossler*, 95 Ind. 29.

It is true that the fixed penalty is imposed for the breach of a duty which telegraph companies owe to the public generally, and not as damages for the non-performance of a contract to properly transmit a dispatch. But such a breach of duty can not arise until after a telegraph company has either entered into a contract, or has become obligated to transmit the dispatch.

The generally accepted doctrine, both in this country and in England, has so far been that it is only the sender of a dispatch who occupies that privity of contract or relation with the telegraph company which is necessary to the maintenance of a suit for the statutory penalty. It is to him, and only to him, as the holding has so far generally been, that the company directly assumes the obligation of sending the dispatch in the manner required, and under the restrictions imposed by law. This is well illustrated by the case of *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12, and the authorities there cited.

That case has been disapproved by the Supreme Court of the United States in so far as it treats of certain interstate relations in telegraphy, but in all other respects it remains unimpaired.

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We do not feel at liberty to hold that this long and well accepted rule of decision has been changed by the act of 1885. It is but reasonable to suppose that if the Legislature had intended to change a rule so well defined and so generally recognized by the courts, it would have done so in terms more direct and more explicit.

The primary object of the first section of the act in question evidently was to protect the interests of the patrons of telegraph companies by preventing, so far as is reasonable, any discrimination between them. It is only those who give business to, and send dispatches over the wires of, a telegraph company that can rightly be called its patrons, within the meaning of the statute. In this view, it is only those entitled to be considered as the patrons of such a company who are authorized to enforce the statutory penalty when it has been incurred.

The person to whom a dispatch is sent can not, therefore, become a "party aggrieved" in the sense contemplated by the act under consideration. Any other construction might result in a multiplicity of suits to recover the same penalty.

The right of Hadley to have judgment for the sum of \$16.80, conditionally assessed in his favor by the jury, involves the application of principles not so well defined, and hence the decision of a question not capable, in our view, of so easy a solution.

The English cases deny the right of the person to whom the dispatch is sent to recover damages for default, either in its transmission or its delivery, upon the ground that there is no privity of contract between him and the company. Many of the American cases, however, give a more liberal construction in favor of the person to whom the dispatch is sent, and this more liberal construction has been adopted as the better and more reasonable rule by this court. *Western Union Tel. Co. v. Fenton, supra*, is the leading case upon that subject. See, also, the case of *Western Union Tel. Co.*

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v. *Pendleton*, *supra*, and the later case of *Western Union Tel. Co. v. McKibben*, 114 Ind. 511.

The rule thus adopted by this court is not expressly based upon that theory, but it receives much support from the equitable doctrine that one person may contract with another in such a way as to inure to the benefit, in whole or in part, of a third person, who may, at his option, enforce so much of the contract as was intended to be for his benefit, or demand compensation for its non-performance.

The circumstances under which a person to whom a dispatch is sent may recover damages for a mistake or default in the transmission of the dispatch, or for an unreasonable delay in its delivery, or for its non-delivery, are various, and are incapable of an exact hypothetical definition applicable alike to all cases that might occur. It may be said generally that the company is only liable for such damages as naturally flow from the breach of duty complained of, or such as may fairly be supposed to have been within the contemplation of the parties as a possible result at the time the dispatch was sent; also, that the damages must result from the default of the company as a proximate cause. In determining what was fairly within the contemplation of the parties when the dispatch was sent, the terms or contents of the dispatch may be taken into consideration. *Bank v. Western Union Tel. Co.*, 30 Ohio St. 555; *Mackay v. Western Union Tel. Co.*, 16 Nev. 222; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; *U. S. Tel. Co. v. Gildersleve*, 29 Md. 232; *Beaupre v. P. & A. Tel. Co.*, 21 Minn. 155; *Hadley v. Baxendale*, 9 Exch. Rep. 341; *Candee v. Western Union Tel. Co.*, 34 Wis. 471.

In this case, the terms or contents of the dispatch sent by Clay to Hadley fairly indicated the necessity of its prompt delivery as well as transmission, and were such as to authorize the inference that a delay until the day following would result in confusion and possible, if not probable, injury to one or both parties to the dispatch. While all the circumstances which led to the injury of the cattle were not found

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as fully, perhaps, as they might have been, and while the question involved is a fairly debatable one and not free from difficulty, we are inclined to the opinion that the circuit court erred in refusing to render judgment in favor of Hadley for the amount of damages conditionally assessed by the jury, and have accordingly reached that conclusion.

The judgment is reversed, with costs, and the cause is remanded with instructions to the circuit court to render judgment in favor of Hadley for the sum of \$16.80 in damages upon the second paragraph of his complaint.

Filed Feb. 28, 1888; petition for a rehearing overruled June 28, 1888.

No. 12,922.

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SUPREME COURT.—*Transcript.*—*Motion to Eliminate Parts of Record.*—*Affidavits.*—*Practice.*—A motion to eliminate parts of the record, alleged to have been interpolated without authority after the appeal, will be overruled, because the transcript, when properly certified, imports absolute verity, and because the Supreme Court will not undertake to reconcile the affidavits for and against the motion, or pass upon their preponderance.

ATTORNEY.—*Equitable Lien for Services.*—*Priority of Payment Over Judgment Creditors.*—An attorney who, by his services, has procured a will to be set aside, and established his client's right to share in the estate of the testator, acquires an equitable lien for his fees upon the fund so secured to his client, and is entitled to priority of payment over a judgment creditor of the latter whose lien attached after the contract for such professional services was entered into.

JUDGMENT.—*General Lien of.*—*Prior Equities.*—The general lien of a judgment upon the lands of the debtor is subject to all prior equities exist-

115	201
139	191

115	201
147	140

115	201
171	246

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ing against such lands in favor of third persons; and a court of equity will limit the lien to the actual interest of the judgment debtor in the property.

From the Cass Circuit Court.

D. Turpie, D. H. Chase and J. M. Justice, for appellant.

D. C. Justice, for appellee.

Howe, J.—On the 20th day of September, 1886, appellee, James M. Justice, moved the court in writing to eliminate from the record of this cause, filed here on this appeal, certain parts thereof for the following reasons, namely: That such parts of the record had been interpolated and added to the transcript of the record since the same was filed in this court and since the appeal herein, and had been added without authority of law and without the knowledge or consent of appellee. In support of his motion appellee filed the affidavits of his attorney, of the official stenographer of the court below, and of the clerk of the Fayette Circuit Court. In opposition to appellee's motion appellant filed the affidavits of himself, of Quincy A. Myers, Esq., an attorney at law of the court below and of this court, of the learned judge who tried this cause below as special judge, of the official stenographer, and of the clerk of the court below, to the effect that appellee's counsel had agreed in open court before the judge thereof, that the so-called interpolated matter which he had withdrawn from the files of the court should be returned and inserted in its proper place in the bill of exceptions without any objection or exception on his part. "We shall not undertake to reconcile the affidavits or pass upon their preponderance." *Louisville, etc., R. W. Co. v. Boland*, 70 Ind. 595.

To us the transcript of the record in any cause, certified by the clerk below under the seal of the court, as is the transcript of the record in the case under consideration, "imports absolute verity." *Du Souchet v. Dutcher*, 113 Ind. 249.

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Appellee's motion to eliminate certain parts of the record of this cause is overruled, with costs.

It is shown by the record of this cause that at and before the September term, 1882, of the Cass Circuit Court, there was pending therein an action for the partition of certain described real estate in Cass county, wherein John G. Crockett and others were plaintiffs, and William A. H. Tate and others were defendants. In this action, on the 5th day of October, 1882, the appellee herein filed an intervening petition, wherein he alleged that, on the 3d day of November, 1874, by the consideration of the Fayette Circuit Court, in this State, one Vincent H. Gregg recovered a judgment against the defendant, William A. H. Tate, for the sum of \$284.94, with interest thereon at the rate of ten per cent. per annum from that date, together with his costs taxed at \$20, which judgment was wholly unpaid; that, on the 1st day of January, 1879, for a valuable consideration, said Gregg sold, assigned and transferred said judgment by his written assignment thereon, to appellee herein, the owner thereof; that, on February 1st, 1879, appellee caused a transcript of such judgment to be filed and recorded in the judgment-docket and order-book of the court below, and such judgment from and after the date last named became a lien upon the lands of defendant, William A. H. Tate, in controversy in the aforesaid action; that in October, 1882, an execution was duly issued on such judgment by the clerk of the Fayette Circuit Court, and was then in the hands of the sheriff of Cass county, which execution commanded such sheriff to levy the same and make the amount thereof of the property of defendant, William A. H. Tate. Copies of such judgment and of the assignment thereof, and of said execution, were made by appellee parts of his petition herein.

And appellee averred that it would be a useless expense to levy upon and sell the interest of defendant, William A. H. Tate, upon such execution, inasmuch as the court below had already directed, in the aforesaid action of partition, the com-

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missioner appointed for that purpose to make sale of the lands in controversy. Wherefore appellee prayed that the court below would make an order that such commissioner should pay to appellee, or to the sheriff of Cass county upon such execution, so much of the proceeds of the sale of the interest of William A. H. Tate in the lands in controversy as would satisfy such execution, with costs accrued and to accrue thereon, and for other proper relief.

Afterwards, the appellant also filed an intervening petition in the aforesaid suit for partition, wherein he claimed that the prayer of appellee's petition ought not to be granted, because, as appellant averred, one Elizabeth Pollard, a resident of Cass county, in this State, on the 30th day of May, 1877, made and published her last will and testament, whereby she devised and bequeathed all her property, real and personal, to certain legatees and devisees therein named, who were not her heirs at law, but were strangers to her blood; that, on the next day, May 31st, 1877, said Elizabeth Pollard died testate, in such county, seized of a large tract of land therein and a large number of out-lots, with valuable improvements thereon, in the city of Logansport; that in June, 1877, the same William A. H. Tate mentioned in appellee's intervening petition herein, employed appellant, an attorney at law, to contest and set aside such last will and testament of Elizabeth Pollard, deceased; that, by the terms of such employment, said William A. H. Tate agreed to pay appellant the sum of \$500 for his professional services as such attorney, to be paid out of the first moneys realized out of any real estate, or any interest therein, which he, Tate, might realize from the estate of said Elizabeth Pollard, deceased, by reason of the setting aside of her aforesaid will; that appellant accepted the terms of such agreement and contract so offered by said William A. H. Tate, and then and thereafter actively engaged in a certain suit in his behalf, which he, William A. H. Tate, and others, as plaintiffs, commenced against William T. Wilson, executor, and others, devisees and legatees, in the

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Cass Circuit Court, to set aside such last will and testament of said Elizabeth Pollard, deceased; that appellant, as such attorney, on behalf of said William A. H. Tate, devoted the greater part of one year, and expended a large sum of money, in the prosecution of the suit so commenced to set aside the aforesaid will; that, by patient labor as such attorney in the suit aforesaid, said will of Elizabeth Pollard, deceased, by the judgment of the White Circuit Court, in this State, was set aside and declared not to be the last will and testament of such decedent; that, in pursuance of such judgment, appellant afterwards in this suit for partition of the lands and lots in Cass county belonging to the estate of Elizabeth Pollard, deceased, proved to the satisfaction of the Cass Circuit Court, wherein such partition suit was then pending, that said William A. H. Tate was one of the heirs at law of such decedent, and, as such, was the owner of the undivided one twenty-eighth part of the one-half in value of the aforesaid lands and lots, and was entitled to partition and to have his said share set off to him in severalty; that in such partition suit it was found and adjudged by the court that the aforesaid lands and lots, including said Tate's share thereof (owing to the decedent's numerous heirs), were incapable of division, and an order was made by the court for the sale of the aforesaid lands and lots, and appointing a commissioner to make such sale, and pay each of the heirs at law of such decedent his share of the proceeds of such sale.

Appellant further averred that the whole amount which would be realized from the sale of William A. H. Tate's interest in the aforesaid lands and lots, would not exceed the sum of \$500, the amount justly due appellant from said Tate, at his special instance and request as aforesaid; that appellee and his assignor had notice of the pendency of the aforesaid suit to set aside the will of said Elizabeth Pollard, deceased, and of appellant's employment as the attorney of William A. H. Tate in the prosecution of such suit, and of the terms as aforesaid of such employment, and of appel-

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lant's services for said Tate in the premises, long before the transcript of the aforesaid judgment against William A. H. Tate was filed in the clerk's office of the Cass Circuit Court; and that the interest of said Tate in the aforesaid estate was acquired by the labor and services of appellant as his attorney and counsel as aforesaid, without which services he, the said Tate, would have never recovered any interest in said estate. Wherefore appellant averred that his equity in the interest of said William A. H. Tate in the aforesaid estate of Elizabeth Pollard, deceased, was superior to the lien of appellee's judgment thereon, and he prayed the court to so declare by its decree, etc.

Afterwards, the matters arising under the intervening petitions of appellant and appellee, respectively, were submitted to the court for final hearing; and upon the evidence adduced by the parties respectively, the court found for appellee James M. Justice, Sr., that he was the owner of the judgment against William A. H. Tate, described in his intervening petition herein, upon which judgment there was then due him of principal, interest and costs, the sum of \$579.36; that the lien of such judgment was the first lien upon the funds in the hands of the court below and its commissioner, in the aforesaid partition suit, upon the sale of said Tate's lands therein, and superior to the claim of appellant James M. Justice, Jr., upon such funds; that the commissioner in such partition suit should first pay appellee the sum so due him upon his said judgment out of the funds aforesaid; and that if, after the payment of the sum aforesaid, with interest, to appellee, there should remain any surplus of the funds arising from the sale of William A. H. Tate's interest in the lands and lots aforesaid, such surplus should be applied to the payment of appellant's claim of \$500 by the commissioner aforesaid—to all of which appellant at the time excepted. Over appellant's motion for a new trial or hearing, the court rendered its final order and

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decree upon the intervening petitions herein, in accordance with its finding.

Error is assigned here by appellant upon the overruling (1) of his motion for a new trial, and (2) of his motion in arrest of judgment, while appellee has assigned, as a cross-error, that appellant's intervening petition does not state facts sufficient to constitute a cause of action, or to entitle him to any relief whatever.

Each of the intervening petitions was sufficient, we think, for the purpose for which it was filed. When considered together, in connection with the evidence in the record of this cause, the two petitions fairly present for our decision the only question we are required to consider and decide, namely: Upon the facts stated in such petitions, the substance of which we have heretofore given, and each of which is fairly sustained by the evidence in relation thereto, which of the intervening parties, appellee or appellant, is entitled in equity and good conscience to priority of payment out of the funds of William A. H. Tate, in the hands of the court below or of its commissioner in the aforesaid partition suit? We are of opinion that appellant is entitled of right to such priority of payment out of the funds aforesaid, as between him and the appellee, and that the court clearly erred in finding and decreeing otherwise. It is true, no doubt, that the general lien of the judgment against said William A. H. Tate, owned and held by appellee and described in his intervening petition herein, attached to the interest or share of said Tate in the lands and lots aforesaid, from which the fund belonging to him in the hands of the court or its commissioner was obtained, before appellant acquired or attempted to acquire a statutory lien upon the judgment of the court in such partition suit, for his fees as Tate's attorney therein, under the provisions of section 5276, R. S. 1881.

But it is equally true that appellant has not asserted, nor has he sought to enforce in his intervening petition herein, any such statutory lien upon the fund belonging to his client,

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William A. H. Tate, in the hands of the court below or of its commissioner in such partition suit. On the contrary, appellant asserts and seeks to enforce herein an equitable lien upon the fund aforesaid, and an equitable claim to priority of payment out of such fund, for his professional services as an attorney at law under a contract with said Tate which antedated the lien of appellee's said judgment, and under which contract and through appellant's labor and services thereunder the said Tate acquired his interest in the lands and lots aforesaid, from the sale whereof by such commissioner, under the order of the court, the fund aforesaid was obtained and held by such court and its commissioner. The general lien of a judgment upon the lands of the judgment debtor is subject to all equities which may exist against such lands, in favor of third parties, at the time the judgment becomes a lien thereon. A court of equity will control the legal lien of the judgment, and limit it to the actual interest of the judgment debtor in the property, and will fully protect the rights of those parties who have prior equitable interests in such property, or in the proceeds thereof. *Buchan v. Sumner*, 2 Barb. Ch. 165; *Monticello, etc., Co. v. Loughry*, 72 Ind. 562; *Hays v. Reger*, 102 Ind. 524; *Heberd v. Wines*, 105 Ind. 237.

In *Puett v. Beard*, 86 Ind. 172, speaking for the court, ELLIOTT, J., said: "It is generally agreed, both here and in England, that a solicitor has a lien for his costs upon a fund recovered by his aid, paramount to that of the persons interested in the fund or those claiming as their creditors. *Barker v. St. Quintin*, 12 Mees. & W. 441; *Vaughan v. Davies*, 2 H. Bl. 440; *Wylie v. Coxe*, 15 How. 415; *Stratton v. Hussey*, 62 Maine, 286; *Andrews v. Morse*, 12 Conn. 444. The reason for this rule is that the services of the solicitor have, in a certain sense, created the fund, and he ought in good conscience to be protected." See, also, *Adams v. Lee*, 82 Ind. 587.

In *Spencer's Appeal*, 9 Atlantic Rep. 523, decided May 9th,

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1887, by the Supreme Court of Pennsylvania, the trial judge had "found as a fact that the money was paid to one who, as an attorney of the court, was employed by the petitioner to attend to the business which produced the money in contention, and that he did render considerable and valuable services, and brought the matter to a successful conclusion." And the Supreme Court held that such attorney was "undoubtedly entitled" to compensation for his services out of the fund.

In *Boyle v. Boyle*, 106 N. Y. 654, a case very similar in some of its features to the case under consideration, it was held by the Court of Appeals of New York that an attorney, who has rendered services in a partition suit, has a lien for those services upon his client's share of the proceeds, paramount to the claims of third persons to whom the client, pending the suit, assigns and mortgages his interest in the property as security for money owing them by him. *A fortiori*, as it seems to us, must it be held in the case at bar, that the lien of appellant for his services, as the attorney of said William A. H. Tate, upon his client's share of the proceeds of the sale of the lands and lots aforesaid, is paramount in equity and good conscience to the general lien of the judgment aforesaid against the said Tate, owned by appellee and described in his intervening petition herein, upon the share of said Tate in such lands and lots, or in the proceeds of the sale thereof in such partition suit.

The bill of exceptions is properly in the record. It was signed by the judge trying the cause, and was duly filed within the time given by the court, and it contained all the evidence introduced by the parties respectively in relation to the liens asserted by each of them, in his intervening petition herein, upon the fund belonging to William A. H. Tate, in the hands of the court below, or of its commissioner, and to the claim of each of them to priority of payment out of the aforesaid fund.

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Our consideration of the evidence in the record, and of the facts established thereby, has led us to the conclusion that the finding of the court below, to the effect that the general lien of appellee's judgment was paramount to the equitable lien of appellant for his services as such attorney as aforesaid upon the aforesaid fund belonging to said William A. H. Tate, and in the hands of such court or its commissioner, is not sustained by such evidence, and is contrary to law.

For these causes we think that appellant's motion for a new trial or hearing herein ought to have been sustained by the court, and that the overruling of the motion was such an error as authorizes and requires the reversal of the judgment below.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain appellant's motion for a new trial or hearing herein, and for further proceedings not inconsistent with this opinion.

Filed April 10, 1888; petition for a rehearing overruled June 13, 1888.

No. 14,277.

WEIR v. THE STATE.

CRIMINAL LAW.—*Arraignment and Plea.*—*Prosecution Originating Before Justice of Peace.*—*Supreme Court.*—*Practice.*—It is not necessary, in a prosecution originating before a justice of the peace, that the record on appeal to the Supreme Court should affirmatively show that the defendant was arraigned and that a plea was entered, either before the justice or in the circuit court.

From the Tippecanoe Circuit Court.

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J. B. Sherwood, for appellant.

L. T. Michener, Attorney General, *J. H. Gillett* and *G. P. Haywood*, for the State.

ZOLLARS, J.—An affidavit was filed before a justice of the peace charging appellant with an assault and battery. On the day set for trial he was present in person and by attorney, and, upon his demand, the cause was tried by a jury. The jury found him guilty and assessed a nominal fine against him. Judgment was rendered upon the verdict. From that judgment he appealed to the circuit court.

After the transcript had been filed in that court the cause was continued until the succeeding term. It is recited in the record that, at that term, the prosecuting attorney being present, appellant, in person and by attorney, also appeared, “and the issues being joined in this cause, come now the following jury,” etc. The jury again returned a verdict of guilty and assessed a small fine, and again judgment was rendered upon the verdict.

Appellant contends that the judgment should be reversed because the record does not affirmatively show that he was arraigned in either the justice’s or circuit court, or that a plea was entered in either court. This contention is fully met by the decision in the recent case of *Johns v. State*, 104 Ind. 557, and hence it will not be necessary for us to extend this opinion in answer, at length, to counsel’s argument. Counsel adopt a false theory in assuming that, because the record does not affirmatively show an arraignment and a plea entered by the court, the judgment will not be a bar to a second prosecution for the same offence. The record shows an affidavit filed, the arrest of appellant, his presence in court in person and by an attorney, a trial by a jury, a verdict of guilty, and the assessment of a fine, a motion for a new trial overruled and a judgment upon the verdict. Clearly, that record will protect appellant against a second prosecution for the same offence. Had he been acquitted, a record of the

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proceedings, as full as that before us, without doubt would protect him against a second prosecution.

On account of the positive terms of the statute, section 1763, R. S. 1881, and a line of cases in this State, we have felt constrained to hold that, where a criminal prosecution is commenced in the circuit or criminal courts, the record upon appeal to this court must show, affirmatively, that the defendant was arraigned, or waived it, and that he pleaded to the indictment or information, or that, standing mute and refusing to answer, a plea was entered for him by the court. *Bowen v. State*, 108 Ind. 411; *Hicks v. State*, 111 Ind. 402. And while we thus adhere to the rulings in the earlier cases, we are firm in the conviction that they should not be extended to cases which have their inception before justices of the peace. We, therefore, adhere to and reaffirm the ruling in the case of *Johns v. State*, *supra*. If we were inclined to a departure in any direction from the rulings in prior cases, it would be towards the liberality of the statute, which declares that "In the consideration of the questions which are presented upon an appeal" in a criminal case, "the Supreme Court shall not regard technical errors or defects or exceptions to any decision or action of the court below, which did not, in the opinion of the Supreme Court, prejudice the substantial rights of the defendant." R. S. 1881, section 1891.

Judgment affirmed, with costs.

Filed April 12, 1888; petition for a rehearing overruled June 13, 1888.

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115	213
196	23
197	94

No. 13,311.

HOPKINS v. RATLIFF.

LANDLORD AND TENANT.—*Invalid Contract to Devise Land.*—*Repairs Made by Tenant.*—*Liability of Landlord.*—Where one goes into possession of land under an oral agreement with the owner by which the latter is to erect a house thereon and devise the land to him, he in the meantime to pay rent for the premises, the relation of landlord and tenant exists, and the occupant can not, upon the owner failing to erect the house, charge the owner with the cost of repairs made at the latter's solicitation upon a house already on the land, unless he has agreed to pay therefor.

SAME.—*Failure of Landlord to Erect House as Agreed.*—*Remedy of Tenant.*—In such case, if the failure to build the house as agreed resulted in damages to the tenant by reducing the value of the leasehold, his remedy is an action for such damages; or he might have erected the house and recovered the cost.

REAL ESTATE.—*Possession Under Contract to Devise.*—*Repudiation of Contract.*—*Liability for Improvements.*—A will can not speak until the testator's death, and hence one who has gone into possession of land under an agreement whereby he is to become the owner thereof by devise, can not, prior to the testator's death, on information that the will as executed does not conform to the agreement, repudiate the contract and maintain an action on account for improvements made.

From the Wells Circuit Court.

A. N. Martin, H. L. Martin, A. Duglay and W. S. Silvers,
for appellant.

MITCHELL, J.—This was a suit by Moses Hopkins against Daniel Ratliff to recover the amount due on a promissory note executed by the latter as maker, and payable to the plaintiff. The note bears date the 1st day of January, 1885, and calls for the payment of three hundred and seventy-four dollars, with 8 per cent. interest, due one day after date.

The defendant answered by way of set-off, that the plaintiff was indebted to him on account in the sum of five hundred dollars and upwards for money paid, laid out and ex-

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pended for his use, and for work and labor, and materials furnished in improving and repairing a house for the plaintiff.

The indebtedness which the defendant claims the right to set off against the note is alleged to have arisen in the manner following: In February, 1878, the plaintiff, Hopkins, being the father of the defendant's wife, and desiring to make an equitable distribution of his property among his children, orally agreed with the defendant that if the latter would convey to the plaintiff an eighty-acre tract of land belonging to him in Wells county, he, Hopkins, would execute his last will and testament, by which he would devise to the defendant eighty acres, part of his home farm, and would also devise forty acres adjoining, with the improvements thereon, to his (defendant's) wife, as her share of his estate; and further, that he would erect a small house, with four rooms, on the eighty acres to be devised to the defendant. It was agreed that the deed from the latter should be held in his own possession without delivery until after the plaintiff's death.

In reliance upon this aforementioned agreement, the defendant signed a deed for the eighty acres to be conveyed to his father-in-law, but kept it in his possession according to the understanding, and the plaintiff executed a will which was supposed to be according to his agreement with the defendant.

Without delivering the conveyance, the defendant surrendered the possession of the eighty-acre tract owned by him to one of the plaintiff's other daughters, reserving to himself, however, a reasonable rental for the use of the land. At the same time he took possession of the one hundred and twenty acres supposed to have been devised to himself and wife by his father-in-law, agreeing to yield to the latter a reasonable rental during the remainder of his lifetime. His father-in-law neglected to build the house with four rooms, but persuaded the defendant to improve and enlarge the house already on the farm, which the latter did, in reliance

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upon the devise which he supposed had been made by the plaintiff.

It was in making these improvements that the account pleaded as a set-off to the note accrued. After having thus remained in possession some four years, the defendant learned that instead of devising eighty acres to him and forty to his wife, the plaintiff had prepared his will so as to devise one hundred and twenty acres to the defendant and his wife as joint tenants. Thereupon the defendant, without requesting that the will should be changed, repudiated the whole arrangement, moved off the plaintiff's land and took possession of the eighty acres belonging to himself.

The question is, whether he is entitled to recover as upon an *indebitatus assumpsit* for the improvements made on his father-in-law's land while in possession under the arrangement disclosed in the foregoing summary of the answer. It seems clear enough to us that this question must receive a negative answer. The occupancy of land under an agreement with the owner to pay rent, presumably creates the relation of landlord and tenant. This relation continues as long as the land is occupied under that agreement.

It is of course true that a person who goes into possession of real estate under a contract to purchase, does not thereby become the tenant of the vendor so as to become liable for rent in case the contract is rescinded. *Newby v. Vestal*, 6 Ind. 412; *Miles v. Elkin*, 10 Ind. 329; *Nance v. Alexander*, 49 Ind. 516; *Wood Landlord and Tenant*, 8.

A suit for use and occupation, or for rent, can only be maintained when there is a contract, express or implied, which creates the relation of landlord and tenant. *Tinder v. Davis*, 88 Ind. 99; *Pittsburgh, etc., R. W. Co. v. Thornburgh*, 98 Ind. 201.

The defendant, in the present case, went into possession under an arrangement whereby he expected ultimately to become possessed of the land as purchaser by devise, which could only take effect at the plaintiff's death. Until the

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happening of that event, the legal title and ownership were to remain in the plaintiff, and the defendant was to pay rent. This created no other legal relation between the parties except that of landlord and tenant, and so long as the defendant occupied, he did so as tenant—yielding, or under contract to yield, rent to the owner of the land.

There being no valid contract of purchase, the possession and improvements can only be referred to the agreement to take possession and pay rent.

The landlord agreed to erect a small house, with four rooms, on the land. This he neglected to do. He prevailed upon the tenant to repair the old house, but it is not alleged that he had agreed to make repairs, nor does it appear that he in any manner promised or agreed to pay for repairs made by the tenant. In respect to the repair of the old house, their duties and obligations were such as the law imposed upon landlord and tenant. There is no implied obligation on the part of the landlord to make repairs, and in the absence of an express contract the duty of keeping the premises in repair rests solely upon the tenant. The tenant must determine for himself the fitness of the buildings for use, or whether they are sufficiently commodious for his purposes. If he repairs or enlarges the buildings for his own convenience, even though it be by the persuasion of the landlord, he does not, in the absence of an agreement or promise, thereby acquire a right to charge the landlord with the expense of the repairs. *Estep v. Estep*, 23 Ind. 114; *Purcell v. English*, 86 Ind. 34; *Lucas v. Coulter*, 104 Ind. 81; Wood Landlord and Tenant, sections 380, 382.

Where a landlord covenants to repair, in case of a breach of the covenant the tenant may make the repairs and charge the expense to the landlord, or he may recover damages for the breach. *Hexter v. Knox*, 63 N. Y. 561.

The failure of the landlord to erect a house, with four rooms, in compliance with the agreement, did not, in the absence of a contract to pay, authorize the tenant to charge the

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cost of repairing another house to the landlord. If the failure or refusal to build the house resulted in damages to the tenant by reducing the value of the leasehold, that became a matter altogether apart from the subject of repairs. Wood Land. and Ten., section 403, and note.

The defendant might have built the house and recovered the cost thereof; or, if the plaintiff refused to build after notice, he might have recovered damages.

A tenant who makes improvements of a permanent and fixed character, which are annexed, so as to become part of the realty, can neither remove them nor recover for their cost without a special contract with the landlord. *Hedderich v. Smith*, 103 Ind. 203 (53 Am. R. 509).

If it should be considered that the defendant occupied the land and made the improvements, not as tenant, but in part performance of a contract of purchase, still, since, after enjoying the possession for about four years, he can not now place the plaintiff in the same situation he was in before the contract was made, he can not repudiate the contract in advance of the time for performance on the part of the plaintiff, and maintain *indebitatus assumpsit* to recover the cost of the improvements.

The defendant has done nothing in part performance of the contract except to take possession and make improvements. These acts, as we have seen, can be much more readily referred to his contract of tenancy than to the contract of purchase, which was not to be performed on either side until after the plaintiff's death, and which is wholly unenforceable until it shall have been so far performed as to be taken out of the statute.

Where possession has been taken by a purchaser, and lasting and valuable improvements have been made under and in reliance upon an oral contract of purchase, if the circumstances are such as to show that the vendor repudiated the contract with a fraudulent purpose to obtain the benefit of improvements made by the purchaser, the contract will be

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held so far valid as to support an action for damages for breach of the contract. In such a case, a purchaser who has made improvements on land, with the knowledge of the vendor, in reliance on a contract, which improvements the latter gets the benefit of by refusing to perform on his part, may recover the value of the improvements so made, deducting the value of the rents and profits of the land. *Bender v. Bender*, 37 Pa. St. 419; *Wallace v. Long*, 105 Ind. 522 (55 Am. R. 222).

Where money has been paid on a contract that is wholly void, there being no part performance, the party receiving the money having repudiated the contract, a recovery may be had upon the common count.

Where, however, the action is to recover for improvements made while in possession and in part performance of the contract of purchase, the action must be for damages for breach of the contract, even though the contract may be so far invalid as not to be enforceable. *Gwynne v. Ramsey*, 92 Ind. 414; *Peters v. Gooch*, 4 Blackf. 515; *Barickman v. Kuykendall*, 6 Blackf. 21. •

The plaintiff, according to the averments in the complaint, is in no default. He agreed to make a will, and the will can not speak until the testator's death. The defendant avers that he is informed, or has learned, that the plaintiff's will, as it is now prepared, does not conform to the agreement. This is not sufficient to authorize him to repudiate the contract and maintain an action on account for improvements made.

The answer was not sufficient. The demurrer should have been sustained.

Judgment reversed, with costs.

Filed June 14, 1888.

Wulschner v. Ward.

No. 13,253.

WULSCHNER v. WARD.

SALE.—*Subsequent Agreement to Rescind.*—*Statute of Frauds.*—Where an unconditional sale of personal property of more than fifty dollars in value has been entirely consummated, an oral contract for its rescission stands upon the footing of a new and independent contract, is within the statute of frauds, and not binding; but where the sale is upon a condition, and some material thing remains to be done before the transaction is complete, an oral agreement for rescission is merely incidental to the original contract, and is binding.

SAME.—Where a piano is sold upon the condition that the purchaser shall have time within which to test it, and that, if it is not as warranted, another will be furnished in its place, a subsequent oral agreement to surrender to the purchaser notes given by him for the purchase-price, if he will return the property, is binding, and entitles the latter to a rescission of the sale, if he promptly complies with the agreement on his part.

From the Marion Superior Court.

A. P. Stanton and J. E. Scott, for appellant.

D. W. Burns, for appellee.

NIBLACK, C. J.—Complaint in two paragraphs by Albert O. Ward against Emil Wulschner for the rescission of a contract for the sale of a piano, and for damages.

The first paragraph charged that the plaintiff was induced to purchase a piano from the defendant by representations that it was sound in every particular, perfect in tone, and free from blemishes and defects of every kind, upon which he relied, but that said representations were false, as the defendant well knew at the time they were made; that after discovering certain defects in the piano, which such false representations gave assurance did not exist, it was agreed between the parties that if the plaintiff would return the piano to the defendant, at his place of business, he, the defendant, would rescind the contract of sale, and would refund the purchase-price paid therefor; that, in pursuance of such agreement,

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the plaintiff returned the piano to the defendant, who refused to receive the same.

The second paragraph was substantially the same as the first, except that it contained no averment of an agreement to rescind the contract and take back the piano.

The defendant answered :

First. In general denial.

Secondly. That the piano was sold under a contract of express warranty, coupled with an agreement that if it should not meet all the stipulated requirements, it might be exchanged for another piano which would do so, and that a tender of exchange had been made before the bringing of the suit, averring a continuing readiness to make the exchange.

Reply in denial.

In response to certain questions submitted to them for the information of the court at special term, a jury made a finding of some material facts. The court also made a special finding of some additional facts adjudged to have been established by the evidence. When grouped together these facts were, briefly stated, as follows: That the piano furnished to the plaintiff did not fulfil the conditions of warranty, or of representations made in regard to it; that the piano sent to the plaintiff was inferior to the one contracted for, and not of the character it was warranted to be; that the defendant orally agreed with one Steep, the plaintiff's agent, that if he, the plaintiff, would return the piano to him, free of cost, he would surrender to the plaintiff the notes given for it; that the piano was sold to the plaintiff on or about the 28th day of May, 1885, for the sum of \$300; that in payment the plaintiff executed to the defendant his six promissory notes, in the sum of fifty dollars each, payable at a bank of deposit and discount in the city of Indianapolis and at the following times; September 15th, 1885, December 1st, 1885, March 1st, 1886, June 1st, 1886, September 1st, 1886, and December 1st, 1886; that thereafter the defendant had the two notes first falling due discounted at said bank before

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maturity, by reason of which the plaintiff was compelled to pay the same, which together amounted to the sum of \$101.75; that the remaining notes had been brought into court to abide its order in relation thereto; that the defendant warranted the piano to be thoroughly made and of the best materials; that, as a part of the contract of sale, the defendant stipulated that if the piano did not prove to be as warranted, it might be returned to him, and that he would then furnish in its place another piano of the same grade, price and manufacture, which would respond to all the requirements which had been agreed upon; that the defendant did, before the commencement of this suit, offer to receive back the piano so sold by him, and to deliver to the plaintiff any other piano of the same grade, price and manufacture; that the defendant, also, before this suit was commenced, offered to exchange the piano for a better one if the plaintiff would pay the sum of \$30 as a difference between them; that the plaintiff lived at Southport, seven miles from the city of Indianapolis; that, in pursuance of his agreement with the defendant for the return of the piano and the surrender of his notes, as stated, the plaintiff did return that instrument to him, the defendant, by sending it to him to the city of Indianapolis, at an expense to himself of six dollars, and there making a full and unconditional tender of the same to him; that the defendant, nevertheless, refused to receive the piano as he had agreed to do; that the agreement for the return of the piano and the rescission of the contract for its sale, was the last agreement made between the parties concerning the piano; that the parties did not enter into any written contract in regard to the sale, exchange or return of the piano.

Upon the facts as thus found, the court below, at special term, came to the conclusion that the plaintiff was entitled to recover from the defendant the sum of \$102.43, and to an order for the return of his notes remaining unpaid. Over

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exceptions properly reserved, judgment was given accordingly, and that judgment was affirmed at general term.

Wulschner, further appealing to this court, first makes the point that it was inferentially shown by the facts as specially found, that the piano was sold upon an express warranty, and that hence, however flagrant the breach of the warranty may have been, Ward did not thereby become entitled to a rescission of the contract of sale, citing *Marsh v. Low*, 55 Ind. 271, and *Hoover v. Sidener*, 98 Ind. 290. These cases hold, and we assume correctly, that where property is unconditionally sold, with a warranty superadded, the purchaser, in the absence of fraud, does not become entitled as of right to a rescission of the sale on account of a breach of the warranty; that the remedy in such a case is either an action for a breach of the warranty, or by way of recoupment or a counter-claim. We do not infer, however, from the facts expressly found, that the piano was sold upon a warranty alone, but rather that the sale was upon a warranty, as well as certain representations concerning its quality and general condition. But whatever the real facts in that respect may have been, we regard the question of the validity or non-validity of the agreement for a rescission of the contract of sale as being the controlling question in the cause.

On Wulschner's behalf, it is insisted that the contract for the sale of the piano became an executed contract before the agreement for the rescission of the sale was made, and that, consequently, the agreement to rescind constituted an independent contract, amounting in fact to an agreement for the resale of the piano; that, as the piano was of a value greater than fifty dollars, the agreement was within the statute of frauds, and, consequently, void.

The question as to when a contract of sale may, and as to when it may not, be rescinded by a parol agreement, has at various times elicited a good deal of discussion, and is one concerning which careful discriminations ought to be observed.

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The following propositions are, as we believe, fairly deducible from the authorities: Where an unconditional sale has been so entirely consummated that nothing further remains to be done, a contract for its rescission stands upon the footing of a new and independent contract, and hence is not a binding contract when it falls within the statute of frauds, that is to say, when such a contract is required to be in writing, and is not; but that where the sale has some condition or contingent agreement connected with it, or some material thing remains to be done before the transaction is complete, an oral agreement for its rescission is binding, provided the agreement is clear and distinct, and provided further, that the party seeking a rescission promptly complies with the agreement on his part. This is upon the principle that an agreement to undo a contract, which to some extent still remains open or incomplete, is an agreement merely incidental and subordinate to the original contract, and hence one which requires no new consideration to support it and to which the statute of frauds does not so readily apply as to the original contract. Bishop Contracts, section 1241; 2 Reed Statute of Frauds, section 461; *Guthrie v. Thompson*, 1 Oregon, 353; *Arrington v. Porter*, 47 Ala. 714; Benjamin Sales (Bennett's Ed.), 660.

The propositions thus believed to be deducible from the authorities are not in conflict with the case of *Chapman v. Searle*, 3 Pick. 38, cited on Wulschner's behalf, but are impliedly supported by it. In that case, the parol agreement to rescind the sale was held to be not obligatory, because no effort was made to enforce it until after the rights of third parties had intervened, and the non-validity of the agreement was placed upon that ground alone.

In the case before us, the sale was upon a condition, in the first instance, and time was given within which the piano might be tested. The sale, too, was upon credit and the purchase-money had not been fully paid. The right to exchange the piano, which had been conditionally reserved to

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Ward, had been, by a subsequent agreement, so modified as to confer upon him the absolute right to have the sale rescinded. This subsequent agreement had, on Ward's part, been fully complied with. He had, therefore, become entitled to a rescission of the sale.

The statute of frauds does not apply to a case in which a parol contract has been so far complied with on the one side as to cause a non-compliance on the other side to operate as a fraud on the party complying. 7 Wait Actions and Defences, 12; *Burnett v. Blackmar*, 43 Ga. 569; *Cook v. Churchman*, 104 Ind. 141.

The judgment is affirmed, with costs.

Filed June 14, 1888.

115	224
115	362
115	507
115	508
115	509
115	600
117	4
118	120
118	160
115	224
130	519
115	224
144	274
144	282
115	224
154	29

No. 13,323.

THE BOARD OF COMMISSIONERS OF WELLS COUNTY ET
AL. v. GRUVER.

GRAVEL ROAD.—*Construction of.*—*Additional Assessment.*—*Notice.*—*Injunction.*—Where the board of county commissioners has made a final order levying an assessment for the construction of a gravel road, it exhausts its jurisdiction to assess land under the original notice, and an additional assessment, if the first proves insufficient, can not subsequently be levied against property-owners without a new notice, and, if levied, its collection may be enjoined.

SAME.—*Pleading.*—An averment that no notice whatever was given of the levying of an assessment is not the statement of a mere conclusion, but the statement of a material fact.

PLEADING.—*Practice.*—*Sustaining Defective Demurrer to Bad Answer.*—*Harmless Error.*—It is at most a harmless error to sustain a defective demurrer to a bad answer.

From the Wells Circuit Court.

The Board of Commissioners of Wells County *et al.* v. Gruver.

J. S. Dailey, L. Mock, A. Simmons, E. R. Wilson and J. J. Todd, for appellants.

ELLIOTT, J.—The complaint alleges, among other things, that the appellee is the owner of the tract of land described; that an assessment was levied upon it for the purpose of constructing the Bluffton and Salamonie Gravel Road; that, on the 9th day of September, 1882, the final order levying the assessment was made by the board of commissioners; that, afterwards, on the 6th day of June, 1884, without notice to the plaintiff, and without any notice whatever, the board of commissioners entered an order levying an additional assessment. Prayer that the collection of the assessment levied on the 6th day of June, 1884, be enjoined.

We regard the complaint as sufficient. There are, doubtless, in it, as the appellants' counsel contend, some conclusions of law, but, excluding all these, there are substantive facts well pleaded, which make the complaint good. The averment that there was no notice whatever of the assessment levied in June, 1884, is not the statement of a mere conclusion of law, but the statement of a material fact. *Davis v. Lake Shore, etc., R. W. Co.*, 114 Ind. 364. The allegation is not that the notice was defective or insufficient, but that there was no notice.

The cases of *Caskey v. City of Greensburgh*, 78 Ind. 233, *Booth v. Board, etc.*, 84 Ind. 428, *Krug v. Davis*, 85 Ind. 309, *Miller v. Smith*, 98 Ind. 226, *Rains v. Scott*, 13 Ohio St. 107, and the other cases cited by counsel are not at all in point. The distinction between an averment that there was no notice whatever, and an averment conceding or implying that there was some notice, is clearly pointed out in *Harris v. Ross*, 112 Ind. 314.

Here it appears that the final order was made on the 9th day of September, 1882, and that in June, 1884, an addi-

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tional assessment was made without any notice whatever. It is obvious that if there was no notice the appellee could only aver that as a fact, for it is logically inconceivable that he could do more. This disposes of the first objection urged against the complaint by the appellants.

Notice is imperative in all such cases as this. A special tax levied for the purpose of aiding in the construction of a gravel road is not valid unless some notice is given the landowner. *Gavin v. Board, etc.*, 104 Ind. 201, and cases cited; *Brosemer v. Kelsey*, 106 Ind. 504; *Board, etc., v. Fullen*, 111 Ind. 410.

The rule we have stated was applied to precisely such a case as the present in *Board, etc., v. Fahlor*, 114 Ind. 176.

The question here is, not what the rule is where there is some notice, but what the rule is where there is no notice at all. If there had been some notice we should have a very different case; but the commissioners, in June, 1884, nearly two years after levying the assessment under the only notice given, attempted to levy the assessment of which the appellee complains. Without some notice there was an utter want of jurisdiction.

The order entered in September, 1882, finally disposed of the proceedings under the notice, and, without a new notice of some character, the board of commissioners had no authority whatever to proceed against the appellee. It is clear, upon principle and authority, that the board of commissioners, having finally adjudicated the cause in 1882, could not assume jurisdiction and order an additional assessment in 1884 without acquiring, by notice, jurisdiction over the appellee. She was entitled to her day in court, and that she has not had.

The appellants' counsel are undoubtedly right in asserting that a taxpayer, who seeks an injunction against the collection of a tax which is illegal only in part, must pay or tender the part which he concedes to be legal. *Roseberry v. Huff*, 27 Ind. 12; *Muncey v. Joest*, 74 Ind. 409, and cases cited;

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Cauldwell v. Curry, 93 Ind. 363; *Russell v. Cleary*, 105 Ind. 502; *Morrison v. Jacoby*, 114 Ind. 84.

But, while we assert the rule, we deny its application to this case. Here, the plaintiff denies that any part of the assessment levied in June, 1884, is valid. She affirms, and the facts she pleads sustain her affirmation, that all of that assessment is void. She concedes nothing as to that assessment; on the contrary, her assault is directed against it as an entirety. Nor does the attack rest upon the theory that there was merely some irregularity in the proceedings of the officers; the theory of the attack is, that the assessment of 1884 was utterly void because there was an entire absence of jurisdiction. The appellee strikes successfully at the foundation and proves the invalidity of the entire assessment. She overthrows the proceeding from beginning to end. The case, be it remembered, is not that of errors occurring after the acquisition of jurisdiction, but of an attempt to proceed where, in law, there was no authority to move a single step.

Counsel are right in stating that the officers are presumed to have done their duty. But this general principle is of no avail to them, for the reason that it is made to appear that the officers did not do their duty. It does affirmatively appear that so far from having done their duty they attempted to proceed in a matter without jurisdiction.

We copy from the brief of counsel a summary of the only paragraph of the answer to which our attention is directed. They say :

“The averments of the third paragraph of answer are, in substance, as follows: That the gravel road is constructed on and across the appellee’s land; that it is a valuable and lasting improvement to her land, and benefits the same \$200; that the viewers estimated the expense of the improvement at \$47,630.17; that the apportionment committee apportioned against the appellee’s land \$89, its fair proportion of said estimated expense, according to the benefits; that the

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actual expense of grading and gravelling the road was \$43,786.90, and that all of the incidental expense was \$922.96, aggregating \$44,709.86; that if the bonds of the county had been issued for said amount in the manner and for the time as those that were issued, with the interest thereon, would aggregate \$57,295; that to meet the payment of such bonds, had they been so issued, it would have been necessary to have placed upon the special tax duplicate, to be paid in the years from 1883 to 1888, inclusive, the sum of \$9,549; that the board of commissioners, instead of issuing bonds for the full amount of \$44,709.86, and to save interest to the parties assessed, issued bonds only to the amount of \$38,000; that the difference between the said actual expense, \$44,709.86, and said bonds, \$38,000, to wit, \$6,709.86, was paid out from the money collected upon the assessments directly upon the expenses of said work, which saved to the parties assessed \$1,335 in interest that would have accrued on the bonds if bonds had been issued for the \$6,709.86; that the auditor, instead of placing said \$9,549 upon the duplicate to be collected in each of the years 1883 to 1888, inclusive, by mistake placed upon the duplicate to be collected in each of said years only the sum of \$7,977.41; that the appellee had full knowledge of these several acts at the time they severally occurred; that the appellee's portion of said assessment for each of said years should have been \$19.09, and for the six years \$114.58; that, by the mistake and miscalculations of the auditor, the sum of only \$14.83 was placed upon the duplicate for said years; that the appellee had only paid the sum of \$44.49 on account of said assessment or improvement on said bonds or the interest thereon; that it was necessary, in order to meet the payment of the bonds that had been issued, with the interest thereon, that matured in the year 1885, to cause the auditor to make a division of said assessment; that the commissioners made such order requiring the auditor to place upon the duplicate against the appellee's land, to be paid in the year 1885, the sum of \$21.95, and a like proportion against the other

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lands benefited; that the appellee refused to pay any part of said instalment of said assessment in excess of \$14.83, which is the assessment of which complaint is made; that it was necessary to place upon the duplicate, to be paid in the year 1886, \$9,892.21, and against the appellee's land for said year, \$18.39; that the appellee will have to pay in 1887, \$16.61, and in 1888, \$15.72; that the tax for 1885, 1886, 1887 and 1888 was wholly unpaid; that the total amount the appellee has paid and will have to pay on account of said improvement, and including all expenses, exclusive of the interest on the bonds, will not aggregate \$79.83, which is \$9.17 less than the original apportionment against her land, and including the interest it will be \$102.33; that all the officers acted in good faith; that no additional assessment was made, but only a division of the assessment into instalments in order to meet the payment of the bonds and interest; that no assessment has been made against the appellee's land in excess of the actual cost of the improvement, with the interest on the bonds, and that no instalment in excess of the sum necessary to pay the bonds as they became due, has been made, and that the appellee 'has failed and refused to pay the assessment against her land, which became due and owing from her in the years 1885 and 1886, and that the same is due and unpaid,' and the court is asked to 'order said tax assessment to remain on the duplicate for collection, or order the same to be again levied, and for other relief.' "

This answer, in our opinion, confesses but does not avoid the material allegations of the complaint. The complaint explicitly avers that the assessment made in June, 1884, was an additional assessment, and the order of the board of commissioners set forth in that pleading contains this clause: "And the said auditor is further ordered to make an additional levy of eight per cent. on the whole of each assessment on said gravel road." The complaint also shows, as we have seen, that the board assumed to make this additional levy without giving notice. These material allega-

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tions are admitted because not denied, and their admission establishes the legal conclusion that the second assessment was void. We can not perceive any reason upon which it can be held that because the first assessment was not paid in full, or because the auditor made a mistake in putting it on the duplicate, the board had authority to make a second assessment. *Board, etc., v. Fahlor, supra.*

Conceding all that is claimed by counsel, the most that the answer shows is, that a greater amount, under the first order, should have been placed on the duplicate. Grant all this to be true, still it does not follow that a second assessment might be made without notice. We do not, by any means, decide that a greater amount should have been placed on the duplicate under the order of September, 1882, but if we should so decide, it would not lead us further than to hold that the mistake might be corrected. But that would not support the answer, for, to be good, the answer must avoid the fact that the second assessment was made without jurisdiction.

It is not the first assessment that is involved here; it is only the second, and the question is, not whether the auditor made a mistake in putting the first assessment on the duplicate, but whether there was any jurisdiction to make the second. It may be true that there is authority to correct the first assessment—a question we do not decide—but if there is, still that does not sustain the action taken by the board of commissioners. We do not deem it necessary to inquire whether the county can justly claim that as it used the amount collected from the land-owners, instead of issuing bonds at once, and thereby saved some interest to the taxpayers, it can rightfully correct the assessment, for the question which controls the case, and the only question, indeed, which it is proper for us to decide, is, whether there was any jurisdiction in the matter of the assessment of June 6th, 1884?

It is urged that the answer shows that the bill has no

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equity, and that for this reason the demurrer to the answer should have been overruled, and we are referred to the cases of *Williams v. Hitzie*, 83 Ind. 303, *Woods v. Brown*, 93 Ind. 164, *Stokes v. Knarr*, 11 Wis. 389, *Woodward v. Dromgoole*, 71 Ga. 523, and *Sharp v. Schmidt*, 62 Texas, 263.

But these cases do not rule such a case as this. Unless the concession is made that the second assessment creates a debt, the cases cited are entirely irrelevant to the point in dispute. That no such concession can be justly made is very clear. Where a tax is levied in a case where there is no jurisdiction, no debt or charge is created against the taxpayer. *Board, etc., v. Fahlor, supra.* Where there is an entire want of authority to levy the tax sought to be collected, the taxpayer neither owes a debt nor is subject to a charge.

The case before us is not at all like the ordinary case, where the land-owner stands by and receives a benefit without objection; for here the work was done and a full assessment made, and that assessment the land-owner has paid, or is ready to pay, when it becomes due. That assessment he concedes to be just, and only challenges the second assessment. Here the attempt is to add an additional burden long after the final order was made, and to do it without jurisdiction.

The benefit assessed is undisputed, and the contention is that a new assessment can not be made without notice.

The appellants' counsel insist that because, as they assume, the demurrer was defective in form, it was error to sustain it, even though the answer is bad. The law is otherwise. *Hildebrand v. McCrum*, 101 Ind. 61. If the answer is bad, then the appellants have no defence, and in sustaining the demurrer, conceding it to be defective in form, there was, at most, no more than a harmless error.

Judgment affirmed.

Filed June 14, 1888.

Richey v. Bly.

No. 13,312.

RICHEY v. BLY.

SET-OFF.—Contract.—Tort.—Waiver.—A claim arising out of tort can not be pleaded by way of set-off against a cause of action founded upon or arising out of contract; nor can the defendant, by waiving his right of action for the tort, make such claim available as a set-off. Section 348, R. S. 1881.

From the Wells Circuit Court.

A. N. Martin and *H. L. Martin*, for appellant.

J. S. Dailey, *L. Mock* and *A. Simmons*, for appellee.

HOWK, J.—In this case the only error assigned here by appellant, defendant below, is thus assigned: "The court erred in sustaining appellee's motion to strike out the second paragraph of appellant's answer to appellee's complaint."

In her complaint, appellee, Susan Bly, plaintiff below, alleged that defendant was indebted to her in the sum of \$73.40, for balance due her from him on settlement, and for work and labor performed by plaintiff for defendant, at his instance and request, and for goods sold and delivered by plaintiff to defendant, etc.

Defendant answered in two paragraphs, of which the first was a general denial of the complaint, and the second paragraph was pleaded as a set-off. Plaintiff's motion to reject or strike out the second paragraph of answer was sustained by the court, and to this ruling defendant excepted, and filed his bill of exceptions. This is the ruling which the defendant has assigned here as error.

The second paragraph of defendant's answer reads as follows:

"And for a second and further paragraph of answer by way of set-off to plaintiff's complaint, defendant says that, before the beginning of this suit, plaintiff was, and still is, indebted to defendant in the sum of \$100 for the value of 150 bushels

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of apples of the value of \$50, by plaintiff unlawfully taken from the orchard of defendant without leave, for the value of ten apple trees belonging to defendant, unlawfully destroyed by plaintiff in wantonness, of the value of \$25, and for the value of 50 pounds of feathers, belonging to defendant and of the value of \$25, by plaintiff unlawfully taken and converted to her own use, or destroyed; that said sum is now due and wholly unpaid; and that defendant herewith submits to plaintiff certain interrogatories, and asks that she be ordered to answer the same. Wherefore defendant, waiving all right of action for the torts, and asking relief simply for the value of the property, asks that said sum of \$100 be set off against a like sum of plaintiff's demand, and for judgment for the residue, for costs and other proper relief."

Plaintiff's motion to strike out this paragraph of answer was in writing, and the following reason therefor was assigned therein, namely: Because the matters pleaded in such paragraph as a set-off to plaintiff's action on account were a series of alleged torts and sound in tort, and were not legal and proper matters of set-off to plaintiff's cause of action.

We are of opinion that the court below did not err in sustaining plaintiff's motion or in striking out the second paragraph of defendant's answer herein. It is settled by our decisions, that a claim arising out of tort, for trespass or the wrongful conversion of property, can not be pleaded by way of set-off against a cause of action founded upon or arising out of contract. *Indianapolis, etc., R. R. Co. v. Ballard*, 22 Ind. 448; *Shelly v. Vanarsdoll*, 23 Ind. 543; *Roback v. Powell*, 36 Ind. 515; *Harris v. Rivers*, 53 Ind. 216; *Boil v. Simms*, 60 Ind. 162; *Zeigelmueeller v. Seamer*, 63 Ind. 488.

Defendant's counsel concede in argument that this court has uniformly held as we have stated. But counsel claim that it is also settled by our decisions, that, where a tort has been committed, it is competent for the injured party, at his election, to waive the tort and to sue for and recover, in *indebitatus assumpsit*, the value of the property wrongfully

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destroyed or converted. It is no doubt true, that such have been the decisions of the court on this point. *Jones v. Gregg*, 17 Ind. 84; *Morford v. White*, 53 Ind. 547. Under these decisions, it might have been competent for defendant to have waived the tort and brought his action to recover the value of the property wrongfully destroyed or converted. But it does not follow that defendant could, by his waiver of the tort, make his claim against the plaintiff, described in the second paragraph of answer, "matter arising out of debt, duty or contract." It is of such "matter" our code imperatively requires that the set-off "must consist." Section 348, R. S. 1881. The set-off attempted to be pleaded in the second paragraph of defendant's answer, did not consist of matter arising out of debt, duty or contract, and plaintiff's motion to strike out or reject it was correctly sustained.

The judgment is affirmed, with costs.

Filed June 15, 1888.

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No. 13,313.

THE BASS FOUNDRY AND MACHINE WORKS v. THE BOARD OF COMMISSIONERS OF PARKE COUNTY ET AL.

COUNTY.—*Claims Against.—Original Action Upon.—Statute Construed.*—The act of March 9th, 1885 (Acts of 1885, p. 80), gives one having a claim against a county the right to bring an original action against the county, in case the board of commissioners shall disallow his claim, in whole or in part.

SAME.—*Presentation of Claim to Board of Commissioners.—Complaint in Circuit Court.—Sufficiency of.*—A claim against a county must, under the existing statute, be first presented to the board of commissioners before the bringing of a suit thereon; but where a complaint against the county is

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filed in a court of general jurisdiction, it is not bad on demurrer for failing to aver the presentation of the claim to the board of commissioners, and its disallowance, but such facts must be brought forward by plea.

SAME.—Construction of County Building.—Abandonment by Contractor.—Board of Commissioners May Complete.—Where the contractor for the construction of a county building abandons his contract after a material portion of the work has been performed, the board of county commissioners has incidental power to take charge of the work and complete the building, without adopting new plans and specifications or letting a new contract, and the county is liable for money, labor or materials furnished at the request of the board and used in the construction of the building.

SAME.—Liability of County for Materials.—Contractor's Debts.—In such case the county is liable for money, labor or materials furnished at the request of the board and used in the construction of the building after the abandonment of the work by the contractor, but the board has no power to assume any indebtedness of the contractor for materials furnished to him, and for such indebtedness the county can not be made liable.

From the Parke Circuit Court.

R. C. Bell, S. L. Morris, J. Morris and J. M. Barrett, for appellant.

A. F. White, for appellees.

MITCHELL, J.—This was a suit by the Bass Foundry and Machine Works of the city of Fort Wayne against the board of commissioners of Parke county. The questions involved arise upon the ruling of the court in sustaining a demurrer to the plaintiff's amended complaint.

The facts upon which the action is predicated, as set forth in the complaint, are, in substance, as follows: Prior to the 11th day of December, 1883, the board of commissioners of Parke county, after having duly adopted plans and specifications and taken the other preliminary steps required by law in that behalf, advertised the letting of a contract and requested bids for the construction of a court-house and jail for Parke county. The contract was regularly let to William H. Myers, at a specified price, he having been the lowest responsible bidder, and having given bond as required by

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law. The contract as finally executed provided, in case the work should be unreasonably delayed or abandoned by the contractor, that the board of commissioners should have the right to enter upon the work and procure such necessary labor and material as might be required to carry on and complete the contract, and charge the cost thereof to the contractor. After having entered upon the execution of his contract and partially completed the buildings, the contractor, Myers, abandoned the work and declared his inability to resume it. He had previously sublet the contract for the iron work to the plaintiff, having agreed to pay therefor \$32,000, and he had also become indebted to it on that account, for work already done, in the sum of \$10,000.

It is alleged in the complaint that, on the date above mentioned, the board of commissioners, pursuant to the right therein reserved, declared the contract with Myers forfeited on account of his previous abandonment of the work, and that the commissioners thereupon gave notice of their purpose to proceed to the completion of the work, and to charge the excess of the cost thereof over the contract-price to the contractor, and to hold him and his sureties liable therefor.

It is further alleged that the commissioners agreed with the plaintiff that in consideration that it would go on and complete the iron work for the court-house and jail, according to its contract with Myers, the board would become responsible for and pay the amount then due from the contractor, and to become due on the contract, and that, in pursuance of such agreement, the plaintiff had proceeded and performed work and furnished materials in the construction and completion of the court-house and jail so left uncompleted by the contractor, which work and materials it is alleged were reasonably worth the sum of \$17,000.

It is averred that the board of commissioners accepted and approved the work, and took possession of the court-house and jail, and that they have ever since used and occupied them, and that although often requested so to do, the

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board has failed and refused, and still fails and refuses, to pay the plaintiff. An itemized account is filed with the complaint.

Except as it may be inferred from the averment that the board had failed and refused to pay the plaintiff, it does not appear whether the claim had been filed with the auditor and presented to the board of commissioners and disallowed. The court sustained a demurrer to the complaint.

Two questions are presented by the rulings on the demurrer :

1. Assuming that the facts stated were otherwise sufficient, was it necessary, in order to make the complaint good and give the circuit court jurisdiction of the claim, that it should have been averred therein that the claim sued on had been filed with the county auditor and presented to the board of county commissioners and disallowed ?

2. Is the board of commissioners of Parke county liable to the plaintiff for the work done and materials furnished in completing the court-house and jail, under the facts disclosed in the complaint ?

It should be remarked that the causes of demurrer assigned were, that the complaint did not state facts sufficient to constitute a cause of action, and " that the circuit court has no original jurisdiction of said cause of action."

The statute regulating the filing and prosecution of claims against counties has undergone some comparatively recent modifications, which require to be briefly considered. Under the statute in force from May 6th, 1853, to May 31st, 1879, county commissioners were forbidden to allow any claim against the county unless the claimant should first file a detailed statement of the items and dates of charge, and, unless the truth of the charge was known to the commissioners, until such competent proof was adduced in favor of the claim as was required in other courts. Provision was made for taking an appeal from all decisions for allowances, except in certain specified cases, within thirty days, or, in case a claim

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was disallowed in whole or in part, the claimant, instead of appealing, might, at his option, bring an action against the county. Sections 5761, 5763, R. S. 1881. While this statute remained in force the uniform holdings were, that a suit might be brought against the county in the circuit court, in the first instance, without presenting the claim to the county commissioners for their consideration. The rulings were distinctly to the effect that it was not necessary either to aver or prove that the claim sued on had been presented to the board of commissioners and disallowed before the commencement of the action, but that a claimant might present his claim to the board, and appeal in case it was disallowed in whole or in part, or that he might, at his option, commence suit against the county in the first instance. *Board, etc., v. Ford*, 27 Ind. 17; *Board, etc., v. Wright*, 22 Ind. 187; *Commissioners v. Holman*, 34 Ind. 256; *Jameson v. Board, etc.*, 64 Ind. 524.

In the absence of restrictive legislation, those cases correctly assume that the liability to be sued in a court of general common law jurisdiction, on matters arising out of contract, is one of the inherent attributes of a municipal corporation.

By the act which took effect May 31st, 1879, it was provided, in substance, that any person who should thereafter have a legal claim against any county should file it with the county auditor, to be by him presented to the board of county commissioners. The commissioners were required to examine into the merits of the claim, and in their discretion allow it in whole or in part as they might find it just and owing. An appeal was allowed to the circuit court to any person feeling himself aggrieved by any decision of the board. Sections 5758, 5759, 5769; R. S. 1881.

The fourth section of the act of 1879 (section 5760, R. S. 1881), reads as follows: "No court shall have original jurisdiction of any claim against any county in this State, in any manner, except as provided for in this act."

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It was uniformly held that the above mentioned act repealed section 5771, R. S. 1881, being section 10 of the act of 1852, by implication, in so far as that section allowed the bringing of an independent action against a county at the option of a claimant whose claim had been disallowed by the board of commissioners, and that the effect of section 4 of the act of 1879 was to deprive all the courts of the State, except boards of county commissioners, of original jurisdiction of claims against counties. *State, ex rel., v. Board, etc.*, 101 Ind. 69; *Board, etc., v. Maxwell*, 101 Ind. 268; *Pfaff v. State, ex rel.*, 94 Ind. 529; *Board, etc., v. Hon*, 87 Ind. 356.

By an act approved March 9th, 1885, section 3 of the act of 1879 (section 5769, R. S. 1881) was amended by substantially re-enacting that section and sections 9 and 10 (sections 5770, 5771, R. S. 1881) of the act of 1852. This amendment necessarily restored the statute, with the interpretation which it had received by this court, as it was prior to the act of 1879, unless section 5760, which provided that no court except boards of commissioners should have original jurisdiction of any claim against a county, remained in force after the re-enactment of section 5771, in the amendment of 1885. The re-enactment of this last section certainly restored the right to bring an original action against the county in case the board of commissioners disallowed a claim in whole or in part. Did it restore the right to bring the action without first presenting the claim to the board, and did it revive the right of the circuit court to entertain original jurisdiction of such a claim before the claim had first been presented to and disallowed by the board of commissioners?

After a good deal of hesitation we are constrained to the conclusion, that the purpose of the act as it now stands was to require claims against counties to be first presented to the respective boards of commissioners before bringing suit. This is to the end that a county shall not be involved in litigation which might be avoided by affording it the opportu-

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nity to discharge its legal obligations without the expense of a suit.

The original jurisdiction of the circuit court is still subject to the provisions of the act of 1879 and the amendment thereof in 1885.

The question still remains, should the demurrer have been sustained to the complaint in the present case because of the absence of an averment therein that the claim had been presented to the board of commissioners and disallowed? The first ground of demurrer, that the complaint does not state facts sufficient, presents no question concerning the jurisdiction of the court. *Whitewater R. R. Co. v. Bridgett*, 94 Ind. 216.

Waiving the question made concerning the informality of the second ground of demurrer assigned, our conclusion is that the complaint is good against a demurrer thereto, in whatever form it may have been drawn.

Section 339, R. S. 1881, enacts that "The defendant may demur to the complaint when it appears upon the face thereof, either: *First*. That the court has no jurisdiction of the person of the defendant or the subject of the action." The rule is universal as applied to courts of general jurisdiction, and especially in matters which proceed according to the course of the common law, that the facts which give the court jurisdiction of the subject of the action need not affirmatively appear on the face of the complaint. *Kinnaman v Kinnaman*, 71 Ind. 417, and cases there cited; 1 Works Pr., section 474.

It follows from the very language of the statute which prescribes the causes of demurrer, as well as from the general rules of the common law, that a demurrer for want of jurisdiction, either in respect to the person of the defendant or of the subject-matter of the action, will only lie when the defect appears upon the face of the complaint. The difference between want of jurisdiction because the court is wholly without power or authority to take cognizance of

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and adjudicate upon the particular subject-matter involved in the suit, and want of jurisdiction on account of the non-existence of some extraneous fact which may or may not exist in that case, is not to be disregarded. Where the court is, in law, incompetent, and without the faculty to deal with the subject-matter before it, its proceedings and judgment, without regard to any question of waiver or consent by the parties, would be *coram non judice*. In such a case the want of jurisdiction would necessarily appear upon the face of the complaint, and objection might be taken by demurrer or motion to dismiss. Where, however, the subject-matter before the court is within its ordinary jurisdiction, so that its judgment would be binding unless the facts going to defeat its jurisdiction in that particular case were brought forward, a court of general jurisdiction may proceed until the facts showing want of jurisdiction are made affirmatively to appear. This is so because the parties may, in such a case, waive any question concerning the jurisdiction of the court. Where facts exist which would deprive the court of jurisdiction, or arrest the proceedings for the time being, the complaint being silent in that regard, objection can not be taken by demurrer, but the facts must be brought forward by answer or plea. If no objection be thus taken, the defect is to be deemed waived.

As has already been seen, under the act of 1885 courts were reinvested with original common law jurisdiction in respect to suits against counties. That act brought the subject-matter generally within the power and authority of the court. In other words, it restored the competency of the court, and gave it the power to take original jurisdiction of and to adjudicate upon the subject-matter of claims against counties. It is necessary that certain precedent facts, viz., the presentation of the claim to the board of commissioners, should have occurred before the jurisdiction of the court becomes perfect and unavoidable, precisely as it is necessary in

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order to give the court jurisdiction to contest the validity of a will that the testator must have died in, or left assets in, or that assets of the estate must have come into, the county where the contest is being carried on. *Kinnaman v. Kinnaman, supra*; *Thomas v. Wood*, 61 Ind. 132. In cases of the latter class, and all others analogous thereto, it has been uniformly ruled that the complaint need not show the jurisdictional facts upon its face. Of course the rule is different in respect to courts of inferior or limited jurisdiction, or where a court of general jurisdiction is exercising a mere statutory power and is not exercising a jurisdiction which was according to the course of the common law.

We are thus led to the conclusion that it was not necessary that the complaint should have shown upon its face that the claim sued on had been filed with the auditor of Parke county, and that it had been presented to the board of commissioners and disallowed, prior to the commencement of the action.

It is argued next that the demurrer was properly sustained, because, in any event, the county is not liable to the plaintiff upon the facts disclosed in the complaint. This argument proceeds upon the assumption that the action of the board of commissioners of Parke county in taking possession of the uncompleted work upon the failure of the contractor, and their agreement with the plaintiff to pay in case it proceeded to furnish and complete the iron work for the court-house and jail, was *ultra vires* and void. This result is said to follow because the statute prohibits county commissioners from letting any contract for the construction of any court-house, jail or other county building, the cost of which exceeds the sum of five hundred dollars, without first adopting plans and specifications, and giving public notice and requesting bids as provided in sections 4243, 4244, 4245, R. S. 1881.

The provisions of the statute referred to apply manifestly to the original contract for the construction of the buildings therein enumerated and referred to.

After a contract has been let in compliance with the pro-

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visions of the statute, and the work has been entered upon, whether the commissioners may, upon the default of the contractor, proceed by the employment of such agencies as are available and complete the building, must depend to some extent at least upon the circumstances of each particular case. In the event that a contractor should abandon his contract when the work is at such an incipient stage as that to complete it would amount practically to the construction of a court-house by county commissioners, without regard to the contract previously let, it might be a question whether contracts made by them for labor and materials would be binding as such upon the county. On the other hand, if, after the contract had been regularly let, the contractor had carried the work forward to such a state as that in the judgment of the commissioners the building could be completed substantially under the contract, by carrying forward and keeping in operation the agencies and forces already in motion, we can see no reason why that course may not be within the incidental power of the commissioners.

The statute (section 5748) makes it the duty of the board of commissioners of each county to construct and furnish a court-house, jail and other necessary public buildings for the use of the county, and to keep them in repair. It requires that plans and specifications be adopted, and that the contract for the building be let in pursuance of certain formalities. The statute makes no provision for such a contingency as has happened in the present case, yet it is within the experience of all that such contingencies are likely to happen in the construction of public as well as private buildings.

It would hardly do to assume that the Legislature failed to consider that such a contingency might happen, or that it was intended in case it did happen, at whatever stage of the work, that the hands of the county commissioners should be tied until new plans and specifications were adopted and a new contract let. In the absence of any provision in the statute for such a case, we must assume that it was intended

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that the commissioners should exercise their best discretion in each case, according to the circumstances that should exist at the time.

Whatever may be said about the binding force and effect of contracts made by commissioners under the circumstances disclosed, certainly, where a county board, in pursuance of its duty to erect public buildings for the county, has proceeded regularly to a point where a contractor abandons the work while it is in progress, and then, in the exercise of its discretion, procures others to furnish money, labor and materials, so as to carry the work forward to completion, the county can not, after accepting and enjoying the buildings thus completed, refuse to repay the money and the reasonable value of the labor and materials furnished at the request of the commissioners. The doctrine of *ultra vires* does not absolve municipal corporations from the principles of common honesty.

When a corporation has received the money or property of an individual, under color of authority, and has appropriated it to its necessary and beneficial use, it will not be heard to assert its want of power to pay the value of what it has received and still retains.

In such a case, where the initiatory steps have been taken which authorize a municipality to proceed with a public work, persons who furnish money, labor or materials to the municipality, which are actually used in the work and retained by it, become equitably entitled to recover. *Bicknell v. Widner School Tp.*, 73 Ind. 501, and cases cited; *Wallis v. Johnson School Tp.*, 75 Ind. 368; *First National Bank v. Union School Tp.*, 75 Ind. 361; *Pine Civil Tp. v. Huber Manfg. Co.*, 83 Ind. 121; *Sheffield School Tp. v. Andress*, 56 Ind. 157; 1 Dill. Munic. Corp., section 464, and note.

It appears from the facts disclosed in the present case that the appellants had taken a sub-contract to furnish the contractor with the iron work for the court-house and jail at a specified price; that it had proceeded so far that the con-

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tractor had become indebted to it in the sum of \$10,000. The commissioners agreed that if it would proceed and complete the iron work according to its contract with Myers, the county would pay the amount due from the contractor, as well as that to become due for the work not yet completed. The commissioners had no power to assume an indebtedness due the appellant from the contractor, and so far its contract can not be enforced, nor has the county come under any equitable obligation to pay the amount due for work done for the contractor. But, in respect to work actually furnished for the county, at the request of the commissioners, the county is at the least liable to pay the actual and reasonable value of the labor and materials furnished, and for the money expended in constructing public buildings which the county has accepted and which it is using and enjoying. These conclusions lead to a reversal of the judgment.

Judgment reversed, with costs.

Filed June 15, 1888.

No. 14,163.

MANNIX v. THE STATE, EX REL. MITCHELL.

OFFICE AND OFFICER.—*Mandamus.*—Mandamus is not available to settle the title to an office as between adverse claimants; but where a person holds a *prima facie* and uncontested title to the office, or where his title has been adjudicated and finally established by a competent tribunal, a writ of mandate may be issued to put him in possession.

SAME.—*Judgment Rendered upon Unlawful Agreement.*—*Validity of.*—Where a judgment, fair and regular upon its face, has been entered by agreement of the parties adversely claiming an office, such judgment is binding until reversed upon appeal or set aside by a direct proceeding, although

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168	512
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the agreement upon which it was entered may have been corrupt and unlawful.

PRACTICE.—*Continuance.*—*Change of Venue.*—*Causes for New Trial.*—The erroneous refusal to grant a continuance or to remand the cause to the court from which an irregular change of venue has been taken, are causes for a new trial, and are only available when assigned as such; but where final judgment has been entered on the pleadings, without a trial, such errors are immaterial.

SAME.—*Appearance.*—*Waiver.*—A party who appears in the court to which the venue of a cause has been changed and moves for a continuance, thereby waives his right to thereafter move that the cause be remanded on account of irregularities in taking the change.

From the Henry Circuit Court.

D. Turpie and *W. F. McBane*, for appellant.

W. R. Hough, *C. G. Offutt*, *J. H. Mellett* and *L. H. Reynolds*, for appellee.

NIBLACK, C. J.—The judgment appealed from in this cause was based upon a complaint filed in the Hancock Circuit Court by the State, on the relation of James L. Mitchell, against James Mannix, to obtain possession of the office of auditor of Hancock county.

The complaint stated that, at the general election held in this State on the 2d day of November, 1886, for the election of State and county officers, the relator and the said Mannix, and one Baker, were candidates, and the only candidates for whom votes were cast for the office of auditor of Hancock county; that the relator received the highest number of votes cast for that office at that election; that, afterwards, on the 4th day of the same month, the board of canvassers, appointed to canvass the returns of that election, met at the court-house of said county of Hancock, and, after having examined such returns and estimated the votes which had been cast, declared the relator to have been elected to said office of auditor; that Mannix, not being satisfied with the result, as declared by the board of canvassers, proceeded to contest the election before the board of commissioners of said county of Hancock; that said board made a finding that

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Mannix had been duly elected auditor of said county and entered judgment accordingly; that the relator appealed from that finding and judgment to the Hancock Circuit Court where such proceedings were thereafter had as resulted in a judgment declaring that he, the relator, had received the highest number of legal votes cast at such contested election for the office of auditor, and that he had, in consequence, been duly elected to that office for the term of four years from the 2d day of November, 1887; also, directing the clerk of that court to issue to the relator a certificate of his election in accordance with such declaration, which was done as directed; that, afterwards, the relator was duly commissioned by the Governor to serve as such auditor for the term of four years from said 2d day of November, 1887; that, on the day last named, the relator executed his official bond and took the required oath of office; that the said Mannix had been auditor of said county of Hancock for the immediately preceding term of four years, and still continued to be in the possession of the office; that, on the 3d day of November, 1887, the relator entered said office and demanded of Mannix the possession of the office, and of the books, papers and other property pertaining to the same, but that he, Mannix, refused to surrender the possession of the office, or of anything connected therewith. Wherefore, an alternative writ of mandate requiring Mannix to surrender the possession of said office of auditor to the relator, or to show cause why he should not do so, was demanded. An alternative writ of mandate was accordingly issued.

Mannix demurred to the alternative writ of mandate upon the ground that upon the facts stated the relator was not entitled to the relief demanded, but his demurrer was overruled.

Mannix, then, by way of a return to the writ, answered:

First. In general denial.

Secondly. That at the general election held in this State for the year 1882 he was elected to the office of auditor of

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the agreement upon which it was entered may have been corrupt and unlawful.

PRACTICE.—*Continuance.*—*Change of Venue.*—*Causes for New Trial.*—The erroneous refusal to grant a continuance or to remand the cause to the court from which an irregular change of venue has been taken, are causes for a new trial, and are only available when assigned as such; but where final judgment has been entered on the pleadings, without a trial, such errors are immaterial.

SAME.—*Appearance.*—*Waiver.*—A party who appears in the court to which the venue of a cause has been changed and moves for a continuance, thereby waives his right to thereafter move that the cause be remanded on account of irregularities in taking the change.

From the Henry Circuit Court.

D. Turpie and *W. F. McBane*, for appellant.

W. R. Hough, *C. G. Offutt*, *J. H. Mellett* and *L. H. Reynolds*, for appellee.

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Mannix had been duly elected auditor of said county and entered judgment accordingly; that the relator appealed from that finding and judgment to the Hancock Circuit Court where such proceedings were thereafter had as resulted in a judgment declaring that he, the relator, had received the highest number of legal votes cast at such contested election for the office of auditor, and that he had, in consequence, been duly elected to that office for the term of four years from the 2d day of November, 1887; also, directing the clerk of that court to issue to the relator a certificate of his election in accordance with such declaration, which was done as directed; that, afterwards, the relator was duly commissioned by the Governor to serve as such auditor for the term of four years from said 2d day of November, 1887; that, on the day last named, the relator executed his official bond and took the required oath of office; that the said Mannix had been auditor of said county of Hancock for the immediately preceding term of four years, and still continued to be in the possession of the office; that, on the 3d day of November, 1887, the relator entered said office and demanded of Mannix the possession of the office, and of the books, papers and other property pertaining to the same, but that he, Mannix, refused to surrender the possession of the office, or of anything connected therewith. Wherefore, an alternative writ of mandate requiring Mannix to surrender the possession of said office of auditor to the relator, or to show cause why he should not do so, was demanded. An alternative writ of mandate was accordingly issued.

Mannix demurred to the alternative writ of mandate upon the ground that upon the facts stated the relator was not entitled to the relief demanded, but his demurrer was overruled.

Mannix, then, by way of a return to the writ, answered:

First. In general denial.

Secondly. That at the general election held in this State for the year 1882 he was elected to the office of auditor of

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Hancock county for the term of four years, commencing on the 3d day of November, 1883; that, after having duly qualified, he, on that day, entered into the possession and upon the duties of that office; that he was still in the possession and in the lawful discharge of the duties of the office; that, after the board of commissioners of Hancock county had decided that he had been re-elected to the office at the general election in 1886, and the matter of the contest of such election had been appealed to the Hancock Circuit Court, a pretended, and false, fictitious and fraudulent judgment, as if by agreement, was entered in said circuit court without any trial, and without the decision of any issue either of law or fact formed between the parties; that it was on that simulated judgment that the pretended certificate of election by the clerk, and the commission from the governor, were issued as claimed in the alternative writ, and upon which the relator based his claim to the office in question; that the so-called judgment upon which the relator's claim to the office is founded was procured by the fraud of the relator, and is wholly void by reason of fraud in the procurement and in the rendition thereof; that, on or about the 18th day of June, 1887, and while the appeal involving the contest for the office was pending in the Hancock Circuit Court, the relator and his attorneys entered into a negotiation with him, the said Mannix, and his attorneys, concerning such contest; that it was finally agreed between the parties that the relator should pay to him, the said Mannix, the sum of \$1,250, in consideration of which the latter's right to the office in contest, including the right to hold the same, to discharge its duties and to receive the emoluments thereof, should be transferred to, and recognized as existing in, the relator; that the relator thereupon paid to him, the said Mannix, the said sum of \$1,250, after which the judgment declaring the relator to have been duly elected as above stated, being the same judgment described in the alternative writ of mandate, was entered as if by agreement of parties; that such judgment was,

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therefore, procured to be entered by the relator in pursuance of such fraudulent agreement, and by the payment of the sum of money named, and for no other reason; that said agreement for the sale and transfer of said office of county auditor was not only against public policy, but was also corrupt, fraudulent and void as between the parties thereto, as well as to all other persons, and that hence he, the said Mannix, was not bound or concluded by the judgment rendered thereon, nor was the relator thereby lawfully adjudged to be entitled to hold said office.

A demurrer was sustained to this second paragraph of answer, and the venue of the cause was then changed to the Henry Circuit Court.

A transcript of the proceedings above set forth was filed in the office of the clerk of the Henry Circuit Court on the 12th day of November, 1887, and the November term, 1887, of that court began on the 21st day of that month. On the second day of the term the cause was set down for trial before the judge of another circuit, specially called to try it, on the thirteenth judicial day of the same term. On the day last named Mannix entered a special appearance, and moved for a continuance of the cause upon the ground that the transcript had not been filed in that court ten days before the term began, but his motion was overruled. He then, continuing his special appearance, moved for an order remanding the cause to the Hancock Circuit Court. This motion was supported by his affidavit, alleging that the cause was ordered to be sent to Henry county over his objection; that, in consequence, he had abandoned his application for a change of the venue of the cause, and did not either pay, or promise to pay, the costs which would have been required to perfect the change, and never ordered the clerk of the Hancock Circuit Court either to make out a transcript of the proceedings in that court or to transmit the papers in the cause to Henry county. This motion was likewise overruled.

Mannix then withdrew the first paragraph of his answer

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to the alternative writ of mandate, and, declining to answer further, it was ordered that a peremptory writ of mandate should be issued to him, commanding him forthwith to surrender to the relator the possession of the office of auditor of Hancock county, and all the books, papers and other property pertaining to that office.

The objection made to the sufficiency of the writ of mandate is founded upon the claim that, upon the facts recited by it, the real object in procuring it to be issued was to try the title of the relator, Mitchell, to the office of auditor of Hancock county, and that a writ of mandate can not be either granted or sustained for such a purpose. It is true that such a writ can not be rightfully invoked to settle a doubtful claim to an office, or to have the title to an office adjudicated upon, as between adverse claimants. In such a case an information in the nature of a *quo warranto* affords the proper remedy. But where the relator holds a *prima facie* and uncontested title to the office, or his title has been adjudicated upon and finally established by a competent tribunal, a writ of mandate may be issued to put him in possession of the office, as well as of the books, papers and other property pertaining to it. On this subject see High Extr. Legal Rem., section 73, *et seq.*; Wood Mandamus, 17; *McGee v. State, ex rel.*, 103 Ind. 444.

As has been shown, the alternative writ, as well as the complaint upon which it was issued, averred that Mitchell's title to the office of auditor had been passed upon and established by the Hancock Circuit Court, and that Mannix had nevertheless refused to recognize the validity of his title, and had continued in the adverse possession of the office. This was sufficient to entitle Mitchell to a writ of mandate to obtain possession of the office.

In the absence of an affirmative showing to the contrary, the presumption is, that whatever a court has done in a proceeding, of which it had jurisdiction, has been correctly done. The reasonable inference from the allegations of the

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second paragraph of the answer, therefore, is, that the judgment of the Hancock Circuit Court, complained of, was regular upon its face, and that it had been, as it purported to have been, entered by agreement of parties. Such a judgment is binding upon the parties to it until reversed upon an appeal, or until annulled or set aside by some direct proceeding instituted for that purpose. It is impervious to a collateral attack from a party to it, however corrupt or unlawful the agreement may have been which led to its rendition. Freeman Judgments, section 334; *Earle v. Earle*, 91 Ind. 27; *Smith v. Hess*, 91 Ind. 424; *Reid v. Mitchell*, 93 Ind. 469.

It is, as contended, a well established rule of law that the courts will not aid in the enforcement of a corrupt or unlawful contract, but will permit the parties to remain in the relative positions in which they have placed themselves. But that rule has no application to a judgment which, by inadvertence or collusion, may have been rendered upon such a contract. Such a judgment, as regards a collateral attack upon it, stands upon the same footing with other judgments rendered in the usual course of legal proceedings, and is as binding upon the parties as any other judgment so long as it remains unreversed or not vacated by some direct proceeding. There was, consequently, no error in holding the second paragraph of the answer to have been insufficient upon demurrer.

Under section 559, R. S. 1881, irregularity in the proceedings of the court by which a party was prevented from having a fair trial, affords a cause for a new trial. The erroneous refusal of a court to grant a continuance, and a similar refusal to order a change of venue in a cause, are both deemed to be irregularities in the proceedings of a court within the meaning of that provision of the statute, and upon an appeal from a final judgment such irregularities can only be made available when they have been assigned as causes for a new trial. Buskirk Practice, 224; *Westerfield*

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v. *Spencer*, 61 Ind. 339; *Morgan v. Hyatt*, 62 Ind. 560; *Walker v. Heller*, 73 Ind. 46.

Upon an appeal from a merely interlocutory order a different rule will sometimes be applied, but a case of that kind constitutes a rare exception to the general rule announced as above. *Shoemaker v. Smith*, 74 Ind. 71.

The improper refusal to remand a cause to the court whence it came, on account of some irregularity in the manner in which the venue was assumed to be changed, must, in ordinary cases and for a similar reason, be treated as affording only a good cause for a new trial.

In the case before us there was no trial, and hence no opportunity of assigning causes for a new trial. Moreover, as final judgment was rendered on the pleadings only, it is quite immaterial to the merits of this appeal whether a continuance of the anticipated trial of the cause was wrongfully denied or whether there were some irregularities in the mere manner in which the venue was seemingly changed. Besides, the motion to remand the cause to the Hancock Circuit Court came too late. To have made it effective, in any event, it should have been made on Mannix's first appearance in the Henry Circuit Court. His previous motion for a continuance carried with it the implication that the cause was properly within the jurisdiction of the latter court, and amounted to a waiver of all mere irregularities in the manner in which the transcript had reached that court.

The judgment is affirmed, with costs.

Filed June 19, 1888.

The Indiana, Bloomington and Western Railway Company v. Wheeler.

No. 13,301.

THE INDIANA, BLOOMINGTON AND WESTERN RAILWAY
COMPANY v. WHEELER.

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RAILROAD.—Highway Crossing.—Wilful Injury.—A team drawing a loaded wagon was seen by the engineer of an approaching train to be coming on an up grade toward a public crossing, at a point where trains could be seen for more than nine hundred feet. The engineer sounded the signals required by statute, and also sounded danger signals. The driver of the team, a youth twenty years old, and familiar with the crossing, was lying upon the wagon seemingly asleep or otherwise unconscious. The engineer did not see the driver, but supposed he was walking on the opposite side of the team. Seeing that the team would not be halted, the engineer, when still several hundred feet from the crossing, made every effort to stop the train, but without avail, and the driver was killed.

Held, that the facts do not show a cause of action for either a negligent or a wilful injury.

From the Parke Circuit Court.

C. W. Fairbanks, O. Gresham, P. S. Kennedy and S. C. Kennedy, for appellant.

V. Carter, S. D. Puett and H. E. Hadley, for appellee.

MITCHELL, J.—This was a suit by Samuel Wheeler against the Indiana, Bloomington and Western Railway Company, the gravamen of the complaint being that the defendant company wrongfully caused the death of the plaintiff's minor son, Walter V. Wheeler, on the 9th day of September, 1884, by "wilfully, knowingly, and with gross negligence running one of its engines and trains upon him at a highway crossing.

The pleading, which is in one paragraph, seems to have been framed with the purpose that it should be good either as a complaint for wilfully and intentionally causing the death of the plaintiff's son, or for wrongfully causing his death, by the negligent conduct of the defendant's agents and servants. In some respects the complaint proceeds upon both theories. For the appellant it is insisted that it fails to state facts suf-

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ficient to constitute a cause of action on either theory. See *Gregory v. Cleveland, etc., R. R. Co.*, 112 Ind. 385.

Without pausing to consider the complaint, it is quite certain, assuming it to have been sufficient in both its features, that the evidence fails entirely to make a case against the appellant in either.

There is no substantial disagreement between the witnesses in respect to the material facts. The testimony shows that on the 9th day of September, 1884, the plaintiff's son, twenty years of age, was engaged, as he had been for several days prior thereto, in hauling wheat from the farm where it was being threshed to the elevator at a station on the appellant's line. The boy was well acquainted with the crossing, having been raised in the vicinity, and having passed over it a great many times. Trains approaching on the railway track could be seen without difficulty for a distance of from 900 to 1,000 feet from the highway over which the young man was proceeding on a loaded wagon, up a rising grade, toward the crossing of the railway track. A passenger train, running at the usual rate of about thirty miles an hour, approached the highway. The highway crossing signals were given as the statute requires. The whistle was next sounded for the station. Seeing a team approaching the railway, apparently without a driver, the engineer gave the usual danger signals. Observing that the team kept on its way regardless of the signals, which were continued, the engineer, when several hundred feet from the crossing, and as soon as he apprehended that the team might not be halted, made every effort in his power to stop his engine, so as to avoid a collision. A lady near by the highway, seeing the boy lying upon the top of the loaded wagon asleep, as she supposed, tried to arouse him by making outcry. A moment before the engine came into collision with the wagon the boy raised up, but it was too late. The engine came upon the wagon with such force as to shatter it to pieces, notwithstanding the efforts of the engineer to stop his engine. The boy

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only survived the collision about two hours, during all of which time he was apparently unconscious.

The evidence tended to show that the young man had been languid and indisposed for several days prior to the accident, but not to such an extent as to be apparently unable to perform his customary work.

The engineer testified that he saw no one on the wagon, and supposed the driver of the team was walking on the opposite side. When he discovered that the team kept on its way, notwithstanding the danger signals, he at once reversed his engine, and employed the air-brakes and every other method and appliance at hand to stop the train. He had its speed so checked when the collision occurred, that the train only ran over the crossing about fifty yards, when it was stopped. A baggageman who looked out of the car door when the danger signals were sounded saw a person, as he supposed, lying on top of the loaded wagon.

It is contended in support of the finding and judgment, that it was the duty of the engineer to have looked out for, and seen the boy, and to have apprehended or known of his unconscious or helpless condition in time, so that he might have arrested the motion of the train and prevented the collision. The failure to stop the train when he must have known there was some one upon the loaded wagon, it is said, evinced such a reckless disregard of human life, on the part of the engineer, as justified the jury in drawing the inference that there was a constructive intent to inflict injury. We can find nothing in the record to justify or sustain the views thus urged.

What is essential to constitute a sufficient averment or finding of a wilful injury has been so fully discussed in recent decisions of this court that it would involve only useless repetition to elaborate the subject here. *Palmer v. Chicago, etc., R. R. Co.*, 112 Ind. 250, and cases cited; *Gregory v. Cleveland, etc., R. R. Co.*, *supra*, and cases cited.

It is enough to say, the admitted facts come far short of

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making the present case one of wilful injury. It is well settled that those who have the control and management of trains must be on the lookout for persons at highway crossings, and that it is their duty to use all reasonable efforts to avoid injuring persons who are on or about to come upon the track when there is reasonable ground to apprehend that such persons are unconscious, or are in such a situation as to be unable to escape. An engineer is not bound to anticipate that the driver of a team, which is seen slowly approaching the track, is asleep, nor is he bound to stop his train, or even to check its speed the moment he sees a team approaching, even though he might see the driver reclining on the load. He has a right, having signalled his coming, and his train being in plain sight from the highway, to assume that the team will be halted before it reaches the track. *Cincinnati, etc., R. W. Co. v. Long*, 112 Ind. 166, and cases cited. This is especially so in a case like the present, where the advancing team was pulling a loaded wagon up grade toward the railroad track. *Indiana, etc., R. W. Co. v. Hammock*, 113 Ind. 1.

There is no dispute but that the engineer made every effort to stop the train as soon as he discovered that the team was keeping on its way. He says he did not see the boy on the loaded wagon. It would not be strange, having the engine in charge and exerting himself to the utmost to stop the train, if the engineer failed to see the boy as soon as others who were looking on. There is absolutely no ground whatever for the assumption that the engineer either purposely, intentionally or recklessly ran upon the boy.

That the unfortunate lad was on the highway, entrusted with a team, while in such a condition of health or unconsciousness that all efforts to arouse him to a sense of the impending peril into which he was being carried, failed, until it was too late, was the gross fault of some one besides the railway company.

There is nothing in the evidence which even tends to sup-

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port the theory that the engineer purposely ran his engine upon the boy, or that he acted recklessly in disregard of human life.

The judgment is reversed, with costs, with directions to the court below to sustain the appellant's motion for a new trial.

Filed June 19, 1888.

No. 9765.

**THE STATE, EX REL. BALDWIN, ATTORNEY GENERAL, v.
THE INSURANCE COMPANY OF NORTH AMERICA.**

PARTIES.—*State.*—*Capacity to Sue.*—In the absence of any statute to the contrary the State may sue in its own name, without a relator, upon any cause of action it may have, and when it elects to do so it will be governed by the rules applicable to other parties.

FOREIGN INSURANCE COMPANIES.—*Moneys Due to State From.*—*Relator.*—

While no relator is necessary in an action to recover moneys due to the State from foreign insurance companies doing business within the State, yet the action will also be well brought either on the relation of the attorney general or auditor of state.

SAME.—*Power of State to Regulate.*—*Constitutional Law.*—A State may impose upon foreign insurance companies, as a condition of coming into or doing business within its territory, any terms, conditions and restrictions that are not repugnant to the Constitution and laws of the United States.

SAME.—*Retaliatory Laws.*—Section 3 of the act of March 3d, 1877 (section 3773, R. S. 1881), which provides that where obligations or prohibitions are, by the laws of any other State, imposed upon insurance companies of this or other States, greater than are required by the laws of this State, then such obligations or prohibitions shall be imposed upon insurance companies of that State doing business here, is constitutional and enforceable.

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SAME.—Taxation.—License Fees.—Moneys which become due to the State from any foreign insurance company under the provisions of such retaliatory statute, whether regarded as taxes for revenue or as license fees, are due and payable as a part of the terms or conditions of its entering this State and transacting business within its limits, and such statute is not within the constitutional restrictions relating to taxation.

SAME.—Statutes of Other States.—Must be Plead.—The laws of other States upon the subject of insurance, such as are contemplated by the retaliatory statute of this State, are not adopted or enacted into the law of this State, but are merely facts, and as such must be pleaded and proved.

From the Marion Circuit Court.

D. P. Baldwin, F. T. Hord and D. Turpie, for appellant.
A. C. Harris and W. H. Calkins, for appellee.

HOWK, J.—In this case the only error assigned here by the State of Indiana, plaintiff below, is the sustaining of defendant's demurrer to plaintiff's complaint herein.

In its complaint the State alleged that defendant was an insurance company, organized in the State of Pennsylvania, and doing business within the State of Indiana, and as such governed by the laws of this State; that, on March 3d, 1877, an act was duly passed by the Legislature and approved by the Governor of this State, entitled "An act to amend section 1 of an act entitled 'An act regulating foreign insurance companies doing business in this State, prescribing the duties of the agents thereof, and of the auditor of state in connection therewith, and prescribing penalties for the violation of the provisions of this act,' approved December 21st, 1865, and adding supplemental sections thereto;" that section 3 of the above entitled act of March 3d, 1877, reads as follows:

"When, by the laws of any other State, any taxes, fines, penalties, licenses, fees, deposits of money or securities, or other obligations or prohibitions are imposed upon insurance companies of this or other States, or their agents, greater than are required by the laws of this State, then the same obligations and prohibitions, of whatever kind, shall, in like

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manner, for like purposes, be imposed upon all insurance companies of such States, and their agents. All insurance companies of other nations, under this section, shall be held as of the State where they have elected to make their deposit and establish their principal agency in the United States." (Now known as section 3773, R. S. 1881.)

And plaintiff averred that on the day and year last named, and ever since, the law of this State for the taxation of foreign insurance companies has been as follows:

"Section 8. Every insurance company not organized under the laws of this State, and doing business therein, shall, in the months of January and July of each year, report to the auditor of state, under oath of the president and secretary, the gross amount of all receipts received in the State of Indiana, on account of insurance premiums for the six months last preceding, ending on the last days of December and June of each year, and shall, at the time of making such report, pay into the treasury of the State the sum of three dollars on every one hundred dollars of such receipts, less losses actually paid within the State."

That the section last quoted is section 8 of "An act supplementary and amendatory of an act entitled 'An act to provide for a uniform assessment of property, and for the collection and return of taxes thereon,' approved December 21st, 1872," approved March 8th, 1873; that the license fee required of foreign corporations, doing business within this State, is \$30 per annum; that since the passage of the aforesaid act of March 3d, 1877, the license fee imposed by the Legislature of the State of Pennsylvania upon foreign insurance companies doing business within that State had been \$500 per annum as shown by the statute of that State, entitled "An act to revise, amend and consolidate the several laws regulating the licensing of foreign insurance companies," approved April 11th, 1868, of which so much as pertained to license, being section 6 of such act, was pleaded specially and set out at length in plaintiff's complaint herein; that, by an act of the Legislature

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of the State of Pennsylvania, entitled "An act to establish an Insurance Department," approved March 3d, 1873, the following is the rule of taxation of foreign insurance companies doing business in the State of Pennsylvania, to wit:

"No person shall act as agent or solicitor in this State of any foreign insurance company, of another State or foreign government, in any manner whatever relating to risks, until the provisions of this act have been complied with on the part of the company or association, and there has been granted to said company or association, by the commissioner, a certificate of authority showing that the company or association is authorized to transact business in this State; and it shall be the duty of every such company or association, authorized to transact business in this State, to make report to the commissioner in the month of January of each year, under oath of the president or secretary thereof, showing the entire amount of premiums of every character and description received by said company or association in this State, during the year or fraction of a year ending with the 31st day of December preceding, whether said premiums were received in money or in the form of notes, credits, or any other substitute for money, and pay into the State treasury a tax of 3 per centum upon said premiums; and the commissioners shall not have power to grant a renewal of the certificate of said company or association until the tax aforesaid is paid into the State treasury."

And plaintiff further averred that defendant had wholly failed and refused to comply with the provisions of the statute of this State above set forth, in this, to wit: Defendant had failed to pay into the treasury of this State since March 3d, 1873, the sum of \$500 per year for a license to transact business within this State; that there was due the State of Indiana, for unpaid license fees, the sum of \$2,000; that defendant had also failed to pay taxes into the State treasury, at the rate of 3 per cent. per annum upon its gross receipts; that since the said statute took effect, the gross receipts of premiums by defendant collected within the State of Indiana

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had amounted to the sum of \$200,000 ; that the taxes thereon at 3 per cent., which defendant ought to have paid, amounted to \$6,000, and the sum actually paid was \$2,500, leaving the sum of \$3,500 due and owing to the State of Indiana as unpaid taxes, and wholly unpaid. Wherefore, etc.

Defendant's demurrer to plaintiff's complaint assigned the following grounds of objection thereto, namely :

1. Because the complaint did not state facts sufficient to constitute a cause of action ;

2. Because plaintiff had not the legal capacity to sue, on the relation of its attorney general, but the action, if at all maintainable, should have been brought upon the relation of the auditor of state ; and,

3. Because several causes of action had been improperly united, to wit, for taxes and for license fees.

This demurrer was sustained by the court, and plaintiff excepted, and, declining to amend or plead further, the court adjudged that it take nothing by its suit herein, etc.

In considering the question of the sufficiency of plaintiff's complaint, we will notice the grounds of objection thereto assigned by defendant, in the inverse order of their statement in its demurrer. The judgment below does not indicate that the demurrer was sustained by the court because several causes of action were united in the complaint, improperly or otherwise. But we may well assume that the complaint was not held bad because of the alleged misjoinder of causes of action therein ; for if the court had sustained the demurrer on the ground of such alleged misjoinder, it would have been the duty of the court, under the statute, to have caused two actions to be docketed between the parties, and that each should stand as a separate action—which was not done. Section 340, R. S. 1881.

Defendant's learned counsel claim that the second cause of demurrer was well assigned, or, in other words, that the action was not well brought upon the relation of the attorney general, and that it could only be brought and maintained,

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under the statute, upon the relation of the auditor of state. In support of this claim, counsel cite and rely upon the *sixth* clause of section 2 of the above entitled act of March 3d, 1877 (now known as section 3772, R. S. 1881), which clause of the statute reads as follows: "*Sixth.* The auditor of state shall also have power to institute suit and prosecutions, either by the attorney general or such other attorneys as he may designate, for any violation of any of the provisions of this act." Defendant's counsel place too much stress, we think, upon this statutory provision, when they claim that it repeals by implication the power of the attorney general to sue in the name of the State, under the provisions of section 5668, R. S. 1881, in force since March 10th, 1873. The utmost that can be said in regard to the effect of the clause above quoted of section 3772, upon prior legislation, is, that if the case under consideration were a suit wherein a relator was necessary, and which could only be brought or maintained upon the relation of a State officer, after the act of March 3d, 1877, took effect, either the auditor of state or the attorney general would have been a competent relator herein.

We are of opinion, however, that no relator was necessary to enable the State to bring or maintain this action. Whenever the State has or claims to have a cause of action, which it seeks to enforce in any of its courts, in the absence of any statute to the contrary, we think that the action may be brought in the name of the State of Indiana, as plaintiff, without any relator; and especially so where, as here, the complaint is signed by the attorney general of the State. Of course, when the State becomes a suitor in the courts, it is as much bound by the laws of the land, by the rules of pleading and practice, and by the judgments and decisions of such courts, inferior or superior, as any other suitor. It may well be doubted, whether the second cause of demurrer assigned by the defendant, under our decisions, properly presented the question of the right or power of the attorney general to bring and prosecute this action in the name of the

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State ; but whether it did or not, the question is in the record and it ought to be decided. We do not doubt the power and authority of the attorney general to commence the action now before us and prosecute it to a final determination in the name of the State of Indiana upon his own relation, or *ex rel.* the auditor of state, or without any relator. Section 5660, R. S. 1881.

In *Shane v. Francis*, 30 Ind. 92, it was held by this court that no relator is necessary in an action by the State, when the obligation is to the State and no individual has an interest therein, other than that common to all.

In *State v. Johnson*, 52 Ind. 197, it was also held that where a cause of action exists in favor of the State, and the action is brought in the name of the State for a certain specified use, the words designating such use will be considered as surplusage, and the action will be regarded as an action properly brought by the State. The court there said : " By the agreement, which is the foundation of the action, the decedent agreed to pay the sum named directly to the State of Indiana, and in such case the action should have been brought in the name of the State, without any averment as for whose use it was brought." In the case in hand, the money sued for, if collected, would belong to the State of Indiana, and no individual would have an interest therein, except the interest common to all the inhabitants of this State. In such a case no relator is necessary.

But the principal and most important questions in the case at bar are presented by the first ground of objection to plaintiff's complaint, assigned in defendant's demurrer, namely : That the facts stated in such complaint were not sufficient to constitute a cause of action. These questions are by no means free from difficulty ; but they have been ably and exhaustively discussed, on both sides, in the oral, written and printed arguments of counsel learned in the law. Defendant's counsel insist that plaintiff's action will not lie, for three reasons, namely :

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1. Because section 3 of the aforesaid act of March 3d, 1877, is unconstitutional and void.

2. Because taxes can not be levied, nor penalties laid, by reference merely to the laws of another State or nation.

3. Because such section 3 is void for uncertainty.

We will consider and pass upon the various objections urged by defendant's counsel to the constitutionality and validity of section 3 of the above entitled act of March 3d, 1877 (section 3773, R. S. 1881), in the same order, as nearly as practicable, as that in which counsel have presented them. We may premise, however, that the primary rule in all statutory exposition and interpretation, often recognized and applied in our decisions, is to explore and, if possible, discover the legislative intention in the enactment of the particular statute which at the time is the subject of inquiry and consideration. It must appear that the statute is clearly repugnant to or in conflict with some provision of our fundamental laws, State or Federal, or its provisions must be upheld and, if possible, must be enforced. In all cases, when the constitutionality of a statute is merely doubtful, it is clearly the duty of the courts to solve all doubts in favor of the statute, and sustain and uphold the constitutionality of the law, if it can be done by any fair construction. This is the doctrine of the decisions of this court, from its organization down to the present time. *Clare v. State*, 68 Ind. 17, and cases cited; *McComas v. Krug*, 81 Ind. 327; *Warren v. Britton*, 84 Ind. 14; *State, ex rel., v. Johnston*, 101 Ind. 223; *Robinson v. Schenck*, 102 Ind. 307.

With these general rules in mind, we proceed now to the consideration and decision of the important questions so ably presented and discussed in this case by the learned counsel as well of the defendant as of the plaintiff herein.

1. Is section 3 of the amendatory and supplemental act aforesaid of March 3d, 1877 (section 3773, *supra*), unconstitutional and void? It may be premised that the first valid legislation of this State in relation to foreign insurance com-

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panies and their agents doing business in this State, was an act entitled "An act regulating foreign insurance companies doing business in this State; prescribing the duties of the agents thereof, and of the auditor of state in connection therewith, and providing penalties for the violation of the provisions of this act," approved December 21st, 1865. Acts of 1865, Spec. Sess., p. 105, *et seq.* This act contained eight sections, exclusive of the emergency section, of which sections 2, 4, 5, 6 and 7 are still in force, and are now known, respectively, as sections 3766, 3768, 3769, 3770 and 3771, R. S. 1881.

Section 3 of the act of December 21st, 1865, was amended by an act approved March 12th, 1875. Acts of 1875, Spec. Sess., p. 51. The amended section is yet in force, and is now known as section 3767, R. S. 1881. The amendatory and supplemental act of March 3d, 1877, contained three sections exclusive of the section declaring an emergency. Section 1 of such amendatory act amended section 1 of the act of December 21st, 1865, and sections 2 and 3 were supplemental sections. Acts of 1877, Reg. Sess., p. 65, *et seq.* These three sections are still in force, and are now known, respectively, as sections 3765, 3772 and 3773, R. S. 1881.

Sections 3765 to 3773, *supra*, inclusive, contain the law of this State regulating foreign insurance companies doing business therein, and prescribing the duties of the agents of such companies and of the auditor of state in connection with such business, in force at the time plaintiff's alleged cause of action accrued against the defendant, and at the time this suit was commenced, and still in full force.

The principle that a State may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions and restrictions it may think proper, that are not repugnant to the Constitution or laws of the United States, is firmly established by the decisions of the Supreme Court of the United States. *Bank of Augusta v. Earle*, 13 Peters, 519; *Lafayette Ins. Co. v.*

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French, 18 How. 404 ; *Paul v. Virginia*, 8 Wall. 168 ; *Ducat v. Chicago*, 10 Wall. 410 ; *Doyle v. Continental Ins. Co.*, 94 U. S. 535.

In *Paul v. Virginia*, *supra*, the court said : "The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 'It must dwell in the place of its creation, and can not migrate to another sovereignty.' The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely ; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

Such is the law applicable to the question we are now considering, as it is declared by the highest court of last resort under our form of government. Under this law, and in the exercise of supreme and sovereign power, the General Assembly of this State enacted the above entitled act of December 21st, 1865, and the subsequent acts amendatory thereof or supplemental thereto, heretofore described and cited herein. In these acts the State of Indiana has imposed upon the defendant herein, and upon other foreign insurance companies, as a condition of coming into or doing business within its territory, such terms, conditions and restrictions as the State has thought proper.

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We have been unable to discover, either from our own search and examination or by the aid of the briefs of defendant's counsel, that any one or more of such terms, conditions or restrictions are repugnant to the Constitution or laws of the United States. Under the decisions of the Supreme Court of the United States heretofore cited, it must be held, therefore, that the terms, conditions and restrictions imposed by our statutes regulating foreign insurance companies doing business in this State, were such as the State might lawfully impose upon the defendant herein, and other similar corporations, as a condition of coming into or doing business within its territory.

Much of the able brief of defendant's counsel is devoted to the consideration of the question whether the moneys sued for by the State in this action are taxes for revenue, or license fees exacted by virtue of the police power of the State. Counsel conclude, however, that, whether such moneys are taxes for revenue or license fees exacted as aforesaid, it must be held that section 3 of the above entitled act of March 3d, 1877, is void, because it attempts to levy different fees, for the same privilege, from different members of the same class. But it is immaterial, as it seems to us, whether the moneys demanded by the State of the defendant herein, under the provisions of said section 3 (section 3773, *supra*), are to be regarded as taxes for revenue or as license fees. In neither case is such section of the statute justly obnoxious to the charge of inequality in its provisions in the sense that would render it unconstitutional.

In *Phoenix Ins. Co. v. Welch*, 29 Kans. 672, a case very similar to the one now before us, the same objection was urged to the retaliatory section of the Kansas statute regulating foreign insurance companies doing business in that State, as the objection we are now considering to our statute; and it was held by the Supreme Court of Kansas that such objection was not well taken. The court there said: "The Legislature may classify for the purposes of taxation or license, and when the classification is in its nature not arbitrary, but

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just and fair, there can be no constitutional objection to it. * * * * Here foreign insurance corporations are classified by the States from which they come, and when we consider the purposes of such classification, it can not be held that there is anything arbitrary or unjust therein. But, doubtless, this charge is not to be considered as within the constitutional restrictions as to taxation, but rather in the nature of a license or condition of entering this State and transacting business within its limits."

. What is here said by the Supreme Court of Kansas, upon the point under consideration, meets our full approval. Monies which have or may become due to the State from any foreign insurance company, under the provisions of the retaliatory section of our statutes regulating foreign insurance companies doing business in this State, are or will be due and payable as a part of the terms or conditions of its entering this State and transacting business within its limits. Such retaliatory section of our foreign insurance company statutes, therefore, is not within our constitutional restrictions in relation to taxation.

Defendant's counsel are mistaken, we think, in their construction of such retaliatory section of our statute, when they assert, as they do, that in and by such section the General Assembly of this State have enacted, or have attempted to enact, "the laws of Pennsylvania on the subject of insurance into our statutes on that subject." Nothing of that kind is done, or is attempted to be done, in or by such section if fairly construed. Nor can it be said, with any degree of legal accuracy, that, by the enactment of such retaliatory section, the General Assembly of this State have "adopted," or have attempted to "adopt," the statute laws of the State of Pennsylvania, or any part thereof, upon the subject of insurance or upon any other subject. To the people and courts of this State, the statutes of the State of Pennsylvania on the subject of insurance, since such retaliatory section became a part of our law, have

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been, as they were before, facts merely, and as such they must be pleaded and proved by any party who relies upon their existence as constituting a part of his cause of action.

But we need not extend this opinion further, in the examination and consideration of the questions presented for decision in the case at bar. It is clear to our minds that section 3 above quoted, of the above entitled act of March 3d, 1877 (section 3773, *supra*), sometimes called and known as the retaliatory section of our statutes regulating foreign insurance companies doing business in this State, is not repugnant to or in conflict with any provision of our fundamental laws, State or Federal. But such section is, we think, a constitutional and valid exercise of legislative will, is not void for uncertainty, is susceptible of enforcement, and ought to be enforced upon the happening of the contingency therein mentioned. Similar legislation to that of our retaliatory section has been upheld as constitutional and enforced by the courts of last resort in the States of Georgia, Illinois, Kansas and New York. *Goldsmith v. Home Ins. Co.*, 62 Ga. 379; *Home Ins. Co. v. Swigert*, 104 Ill. 653; *Phoenix Ins. Co. v. Welch*, 29 Kans. 672; *People v. Fire Ass'n, etc.*, 92 N. Y. 311. See, also, as bearing upon the questions under consideration, *Insurance Co. v. Brim*, 111 Ind. 281, and *Phenix Ins. Co. v. Burdett*, 112 Ind. 204, and cases cited.

Our conclusion is, that the court below erred in sustaining defendant's demurrer to plaintiff's complaint herein.

The judgment is reversed, with costs, and the cause is remanded with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

Filed June 20, 1888.

Nelson v. Welch.

No. 12,953.

NELSON v. WELCH.

TRIAL.—*Argument to Jury.*—*Misconduct of Counsel.*—*Material Error.*—Where, in a cause appealed from a justice of the peace to the circuit court, the plaintiff's counsel, in his closing address to the jury, states that the only object of the defence is to reduce the judgment obtained before the justice enough to throw the costs on the plaintiff, there is such misconduct as will require a reversal, although the language be withdrawn upon objection being made, unless the court promptly and explicitly directs the jury to disregard the improper statement.

SAME.—*Presumption that Improper Statements are Injurious.*—*Burden of Showing the Contrary.*—Such statements are presumably prejudicial to the adverse party, and the burden is upon the party offending to show that no injury resulted, or that all proper steps were taken to prevent injury.

From the Ohio Circuit Court.

S. R. Downey, for appellant.

J. B. Coles, for appellee.

MITCHELL, C. J.—Welch sued Nelson, on an account, before a justice of the peace in Ohio county. Both parties appeared, and after a trial there was a judgment against Nelson for \$54.92. The latter appealed to the circuit court, where the case was again tried by a jury, who returned a verdict in favor of the plaintiff for \$50.85, the reduction being within ninety-three cents of the amount necessary to carry the costs against the prevailing party.

The only question involved in this appeal relates to certain statements made by plaintiff's counsel in his closing address to the jury. It is recited in a bill of exceptions set out in the record, that the plaintiff's attorney during his closing argument made the following statement:

"The only object of the defence in this case is to reduce the judgment five dollars and throw this poor man into the costs. Their object is simply to reduce the judgment below fifty dollars." The bill proceeds as follows: "To this lan-

115	270
115	333
116	393
115	270
127	497
115	270
137	353
115	270
160	440
160	441

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guage the defendant at the time objected, for the reason that it was improper and irrelevant, and brought before the jury that which had occurred in the verdict and judgment before the justice of the peace. Thereupon, counsel for the plaintiff stated to the court and jury as follows: 'I do not remember the exact words used, but if I have made the statement as Mr. McMullen has charged, it was improper, and I withdraw it and the jury should disregard it.'"

The foregoing is all that appears in the record having relation to the point in controversy, except that the statement of counsel as above set out, and the objection thereto, was assigned in the defendant's motion as one of the grounds for a new trial.

Without attempting to defend the propriety of the statement, it is contended in support of the judgment, that the trial court, with all the facts and circumstances before it, decided that there was no such misconduct on the part of the prevailing party as required the granting of a new trial, and that this court must hence presume in favor of the ruling below, until the record affirmatively shows an error which injuriously affected the rights of the appellant. The argument is, that in the absence of the evidence it does not appear but that a right result was reached. Besides, it is said, for aught that appears, the court may have set the whole matter right in its instructions to the jury, which are not in the record. Moreover, four of the jurors signed an affidavit, in which they affirm, that they arrived at their verdict by considering all the evidence in the case, wholly uninfluenced by any remarks of counsel, and, therefore, it is said, it affirmatively appears that no harm resulted from the remarks of counsel.

Statements such as those set out in the bill are presumably injurious and prejudicial to the adverse party, and the burden is upon the party offending to show that no injury resulted, or that all such steps were taken to prevent injury as

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were proper under the circumstances. Thompson & Merriam Juries, section 439.

It is of course quite certain, if the plaintiff had been permitted, over objection, to introduce in evidence, in the regular way, the facts stated by counsel in his closing address, that the admission of such evidence would have constituted reversible error. Under no circumstances would it have been proper for the plaintiff to prove to the jury, in the legitimate way, that if their verdict should be less than fifty dollars it would result in throwing the costs on the plaintiff. If such evidence had been thus admitted, it would have been incumbent on the plaintiff to make it appear by the record that it had been withdrawn, with clear and explicit instructions from the court to the jury to disregard it; or that the verdict was unquestionably right notwithstanding the evidence erroneously admitted. *Pennsylvania Co. v. Roy*, 102 U. S. 451; *State v. Towler*, 13 R. I. 661.

Should the rule be different, when, by an unsworn statement which the party injured has no opportunity to rebut, and which was made, so far as the record discloses, with the approbation of the court, a train of incompetent and prejudicial facts is lodged in the minds of the jury? It is not enough for a party who so offends against the rules which should be observed in the administration of justice to retract. The jury may have been impressed more by the injurious statement than by the retraction, however politely made. Indeed, the retraction ingeniously made by counsel may aggravate the statement. When the party who is injured by the wrong calls for the intervention of the court by an objection, it will not do for the court to remain silent, leaving the matter of misconduct with the offending party and the jury. The court is bound to interpose when so called upon, and if an improper and injurious statement has been made without excuse, the effect of it should be erased from the minds of the jury then and there, by an emphatic and explicit admonition from the court.

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The jury should be made to understand that in making the statement counsel violated the propriety of his position, and that if they did not wholly disregard it they would violate their duty as jurors.

So far as appears from the record the court remained silent when the objection was made. This is not enough. It is the duty of the offending party to make it appear, by the record, that nothing reasonably proper to be done was omitted in order to rectify the wrong and restore to the trial the fairness of which he presumably divested it. *Campbell v. Maher*, 105 Ind. 383; *Bessette v. State*, 101 Ind. 85; *Brow v. State*, 103 Ind. 133; *Shular v. State*, 105 Ind. 289 (302); *Farman v. Lauman*, 73 Ind. 568; *School Tp. of Rochester v. Shaw*, 100 Ind. 268; *Carter v. Carter*, 101 Ind. 450; *Bullard v. Boston, etc., R. R. Co.*, 2 New Eng. Rep. 899; *Bremmer v. Green Bay, etc., R. R. Co.*, 61 Wis. 114; *Brown v. Swineford*, 44 Wis. 282.

To that end it must appear that the court took cognizance of the statement objected to, and if it was injurious and improper, and made without provocation or excuse from the party objecting, that the matter was in some way set right. Even though the court may have done its utmost to repair the injury, if misconduct of the prevailing party has been such as to prevent a fair trial, if it was seasonably objected to and not waived, it still remains for the court to determine, upon a motion for a new trial, whether or not injustice may not have resulted. *Rudolph v. Landwerlen*, 92 Ind. 34.

If the offence is of such gravity as to prevent a fair trial before the jury then empanelled, it is within the discretion of the court, upon the motion of the injured party, to arrest the further progress of the trial, and empanel a new jury. The affidavits of the four jurors do not rescue the case. *Kinnaman v. Kinnaman*, 71 Ind. 417; *Jacques v. Bridgeport Horse R. R. Co.*, 41 Conn. 61; *Dougherty v. Welch*, 53 Conn. 558.

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The court should have sustained the appellant's motion for a new trial.

Judgment reversed, with costs.

Filed April 13, 1888.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—Where an attorney in addressing the jury makes a statement that he has no right to make, and that statement is of a material character, there is more than a harmless error. The error of the court in declining to interfere will require a reversal, unless it clearly appears that the verdict is right on the evidence. Where there is a conflict of evidence the error must be deemed prejudicial, and this must be presumed in the absence of the evidence.

The rule that presumptions will be made in favor of the trial court does not apply where the record affirmatively shows a material error. The case of *Shular v. State*, 105 Ind. 289, is not in point.

Where counsel make an improper statement of a material character, the only method by which its influence can be neutralized is by the prompt and decided interference of the court. A mere retraction by counsel is not enough where the opposing counsel properly invokes the aid of the court.

Petition overruled.

Filed June 19, 1888.

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No. 14,435.

115	275
124	198
126	188

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CRIMINAL LAW.—Rape.—Previous Intercourse With Accused.—Evidence.—

Where several persons are on trial for rape, the prosecuting witness may be required to answer a question propounded on cross-examination as to whether she had not, a short time before the crime was alleged to have been committed, voluntarily had sexual intercourse with one accused by her with the defendants, and indicted with them, but as to whom the prosecution had been dismissed.

SAME.—Witness.—Self-Crimination.—In such case the witness can not refuse to answer on the ground that her testimony might criminate her, for even if it so tended, the statute (R. S. 1881, section 1800) prohibits testimony given under such circumstances from being used in any prosecution against the witness.

SAME.—Cross-Examination.—The right to cross-examine can not be restricted to mere general statements, but there is a right to interrogate as to particulars and details.

From the Bartholomew Circuit Court.

F. T. Hord and *M. D. Emig*, for appellants.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

ELLIOTT, J.—Bedgood, Hill and Bozell, the appellants, were convicted of the crime of rape. With them were indicted Henry Shumway, and Andrew Gaston. A *nolle* was entered as to Shumway and Gaston was acquitted.

Ardelle Tilford, the woman upon whom it is alleged the rape was committed, gives substantially this account of herself and of the crime charged against the appellants: She was a married woman, twenty-one years of age, and lived with her husband in the village of Jonesville. There were inhabited houses not far from the house in which she lived. On the night of the 7th day of January, 1888, the persons accused of the crime came to the house and forced open the door. Two of them, Gaston and Bedgood, seized her and placed their hands over her mouth. They told her that if

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she cried out they would kill her, and that if she told her husband they would kill him and kill her. When they entered the house she was in her night-clothes; they told her she might put on her clothes, and, as she says, they helped her "put on a loose Mother Hubbard dress." They took her into the back room, Gaston and Bedgood having hold of her and the others following, but they could not all get into that room because of its size. She was held by some of the accused during the whole time, having been first thrown on a bed, and each one of them violated her person. They repeated their threats and she made no outcry because, as she says, she feared to do so, and because some one of the men held his hand over her mouth. After they had accomplished their purpose, they left the house but returned within five minutes and remained a short time, again violating her person. After they had violated her person the second time, Gaston attempted to fix the door fastening and some of the others went to her trunk. After they left, she went to the house of John Lewis and informed him or his family that some one had broken into the house, but she did not make complaint of any one of the accused until the Monday after the occurrence. The reason she did not inform her husband or any one else sooner was, because she feared that the accused persons would kill her and kill him. On Sunday morning she told Mrs. Lewis and others that the persons who had broken into the house had not injured her and had not put their hands upon her, and she made substantially the same statement to Mr. Lewis and perhaps others.

This is substantially her testimony as elicited by the direct examination. John Q. A. Lewis was called by the State, and he testified that on Saturday night, January 7th, 1888, about ten o'clock, Mrs. Tilford came to his house and asked that some one come to her house, but made no complaint that any outrage had been committed upon her person. Mr. Tilford, the husband of Ardelle Tilford, as a witness for the prosecution, testified that no complaint was made by his wife

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of the alleged crime on Saturday night, but that complaint was made by her on Monday night. He also testified that she was weeping during Monday.

W. H. Meyers testified that he saw her on Monday morning, and that she was then somewhat excited, and he also testified that he saw some marks on her face. These were all the witnesses called by the State, except such as were called upon the question of character.

Gaston adduced very strong evidence of an *alibi*, and on that ground was acquitted, although Mrs. Tilford testified quite as positively to his presence as to that of any one else, and, indeed, testified that he took a rather more active part in the affair than any of the others.

Shumway testified that he was not at Mrs. Tilford's house after seven or eight o'clock, that Bedgood and Gaston came in as he went out, and that no personal violence was inflicted upon her. Shumway was corroborated by Wagoner, Wright and other witnesses.

Miss Lewis testified that when Mrs. Tilford came to her father's house on the night of January 7th there were no marks of violence on her person, that her clothes were not torn, that she said six or seven men had broken into her house, but she did not know who they were, and that she made no complaint of an outrage on her person. Mrs. Lewis gave substantially the same testimony.

Mrs. King, to whom Mrs. Tilford says she made complaint on Monday, testified that no complaint was made by Mrs. Tilford of an outrage on her person, but that she did say that six or seven men, none of whom were known to her, had broken into her house and taken things out of her trunk and scattered them about. This witness also testified that there were no marks of violence on Mrs. Tilford's face.

The accused persons all denied that they had used any violence or threats, but some of them admitted that they did, at different times during the early part of the evening of

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January 7th, have sexual intercourse with Ardelle Tilford with her consent.

In many particulars the evidence of the accused was corroborated, and in many that of Mrs. Tilford was contradicted by them and by other witnesses. A number of witnesses testified that Mrs. Tilford's general reputation was bad, and others testified that it was good.

It is not our purpose to decide the case upon the evidence, and we have given a synopsis of the evidence for no such purpose; our purpose is to show that the evidence is not of that satisfactory character which will enable us to say that the verdict is so clearly right that we can rightfully disregard errors committed in excluding testimony. We are, indeed, strongly impressed with the argument that the verdict is wrong on the evidence.

The character of the case and of the evidence was, at all events, such as to entitle the appellants to the benefit of all the testimony they could adduce, and if any legitimate evidence has been excluded there must be a reversal. The evidence of the State is, at least, not of that strong and satisfactory character which would justify us in adopting the theory that the verdict is so clearly right that errors may be disregarded.

The appellants asked Mrs. Tilford, on cross-examination, whether she had not, a short time before the crime was alleged to have been committed, voluntarily submitted to the embraces of Henry Shumway. The trial court refused to require the witness to answer. The legal question is presented in various forms, but it is not necessary that we should do more than state it generally.

If the prosecution had not dismissed as to Shumway, it is quite clear, upon principle and authority, that the appellants might, as of right, have required Mrs. Tilford to answer the questions propounded to her. The law upon this subject is thus stated in a recent work: "But previous acts of incontinence with the defendant stand on a different ground, and

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are fairly comprehended within the *res gestæ* of the inquiry ; and within the same principle evidence is competent of the woman's lewd and indecent behavior towards the defendant." Gillett Crim. Law, section 733. The authorities support this proposition. *Eyler v. State*, 71 Ind. 49 ; *Anderson v. State*, 104 Ind. 467 ; *Rex v. Martin*, 6 C. & P. 562 ; *State v. Forshner*, 43 N. H. 89 ; *State v. Cook*, 22 N. W. Rep. 675 ; *People v. Abbot*, 19 Wend. 192 ; *Shirwin v. People*, 69 Ill. 55 ; *State v. Jefferson*, 6 Iredell, 305 ; *Hall v. People*, 47 Mich. 636 ; *Wilson v. State*, 17 Texas App. 525 ; 1 Wharton Crim. Law (9th ed.), section 568.

The principle upon which these authorities proceed is that evidence of previous illicit commerce renders it probable that force was not used. This principle has a two-fold effect, inasmuch as it affects the credit of the woman who charges that her person was forcibly violated, and, also, supplies the accused with a circumstance making it probable that he did not obtain by violence what he might have secured by persuasion or for money. It is, the rule assumes, not probable that a man who has procured without committing a felony what he desires, would commit a felony to obtain it. A man accused of crime has a right to all relevant testimony that tends to make it appear improbable that he is guilty of the crime with which he is charged.

"Like reason," it was said of old, "doth make like law." The like reason extends the rule declared by the authorities to this case. If it be true that Shumway did have sexual intercourse with Mrs. Tilford with her consent, then it is not probable that he would have joined other men in forcing her to submit to his embraces. If this is not probable, then it is not probable that such an occurrence took place as Mrs. Tilford testified to on the night of January 7th, 1888 ; for, if it is probable that he was not with the appellants on that night, or that he did not unite with them in a felony, it is fairly inferable that the story told by Mrs. Tilford is not worthy of belief. We do not, of course, decide what weight

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should be given the evidence; all that it is necessary or proper for us to decide is, that the evidence sought to be elicited was relevant and competent. Where evidence is competent and relevant, it is the duty of the court to receive it, leaving it for the jury to determine its weight. *Pedigo v. Grimes*, 113 Ind. 148, and cases cited; *Grand Rapids, etc., R. R. Co. v. Diller*, 110 Ind. 223, and cases cited; *Harbor v. Morgan*, 4 Ind. 158.

The fact sought to be brought out on cross-examination, it is obvious from what he have said, affected all the persons accused, for, if it was improbable that Shumway would have resorted to violence, it is also improbable that he was one of several who did, and if he was not, then the occurrence did not take place as Mrs. Tilford describes it. By dismissing the case as to Shumway, the prosecution could not take from the appellants evidence that was favorable to them.

Mrs. Tilford was not entitled to refuse to answer upon the ground that the answer might criminate her. If she had admitted that she did have sexual intercourse with Shumway on the night of January 7th, 1888, it would not, it seems, have tended to prove her guilty of any crime, for the law does not make a single act of sexual intercourse a criminal offence. Gillett Crim. Law, section 192. But waiving a decision and conceding that the answer might tend to criminate her, still she could not as of right refuse to answer, because the statute prohibits testimony given under such circumstances from being used against an accused. R. S. 1881, section 1800; *Wilkins v. Malone*, 14 Ind. 153; *Frazee v. State*, 58 Ind. 8; *LaFontaine v. Southern, etc., Ass'n*, 83 N. C. 132; *State v. Nowell*, 58 N. H. 314; *United States v. McCarthy*, 16 Rep. 388; *State v. Quarles*, 13 Ark. 307.

If the statute did not fully shield the witness the rule would be different, but here the shield completely protects the witness. *State v. Enochs*, 69 Ind. 314.

We can not agree with the attorney general that, because

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Shumway was permitted to testify that he did have previous sexual intercourse with Mrs. Tilford, the error in denying the right to compel Mrs. Tilford to answer was a harmless one. Nor can we agree that, because Mrs. Tilford denied in general terms that Shumway was at her house early in the evening of January 7th, the error was rendered harmless. The right of cross-examination would be valueless if restricted to mere general statements, and it is uniformly held that it can not be thus restricted. Where there is a right to cross-examine, there is a right to interrogate as to particulars and details. *Hyland v. Milner*, 99 Ind. 308, 311; 1 Greenleaf Ev., section 446. But in this instance the fact inquired about was material in a very high degree, and was a fact affecting the credibility of the witness, as well as one going to one of the essential elements of the crime charged against the accused. 1 Wharton Ev. (3d ed.), section 542.

Other questions are discussed by counsel, but as the judgment must be reversed, and the questions discussed may not again arise, we do not deem it necessary to examine them.

Judgment reversed, with instructions to sustain the appellants' motion for a new trial.

Filed June 20, 1888.

Morris v. The State, *ex rel.* Address.

115 282
121 161

No. 14,309.

MORRIS v. THE STATE, EX REL. ADDRESS.

BASTARDY.—*Jurisdiction of Justice of the Peace.—Residence of Defendant.—*

Where Proceedings May be Commenced.—It is not necessary that bastardy proceedings shall be commenced in the township in which the defendant resides. Such proceedings are commenced by *capias*, and the jurisdiction of justices of the peace is not limited to their townships, but is co-extensive with the county in which they reside, and within that territory the warrant may be served. Section 1441, R. S. 1881.

SAME.—*Appeal by State.—Presumption.*—The State may appeal from the judgment of a justice of the peace in bastardy proceedings; and where the defendant was discharged by the justice, it will be presumed, on appeal to the Supreme Court, where the record is silent, that the State regularly appealed to the circuit court.

SAME.—*Order for Maintenance of Child.—Interest on Deferred Payments.*—It is within the discretion of the circuit court, in bastardy proceedings, to render its judgment so that deferred payments shall draw interest. Section 992, R. S. 1881.

From the Switzerland Circuit Court.

J. B. Coles and F. M. Griffith, for appellant.

MITCHELL, C. J.—The relatrix made written complaint, under oath, before a justice of the peace of Switzerland county, in which she charged Charles Morris with the paternity of a bastard child of which she had been theretofore delivered.

The defendant was arrested upon a warrant duly issued by the justice. After obtaining two continuances, covering the period intervening between May 26th and June 11th, the defendant pleaded, in abatement of the jurisdiction of the justice, that he was a resident of Switzerland county, but of a different township therein than that in which the justice before whom he had been brought for examination resided.

The State replied, in effect, that the defendant had waived the right to question the jurisdiction of the justice by applying for and obtaining the several continuances above mentioned.

The plea in abatement and the reply thereto were refiled

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in the circuit court, and, upon an admission by the parties, respectively, that the facts stated in the several pleadings were true, the court found against the appellant on the issue thus made. This is complained of as error.

In *Hawley v. State, ex rel.*, 69 Ind. 98, it was held, in consonance with the settled rule, that proceedings in bastardy, except as otherwise specially provided, are governed by the code of civil procedure, and that such proceedings must be commenced in the county in which the defendant resides, when he resides in the State.

The appellant assumes that it follows from the ruling in the case above cited that bastardy proceedings must, under like circumstances, be commenced in the township in which the defendant resides. Upon this assumption, it is contended that the court below erred in holding that the defendant had waived his right to question the jurisdiction of the justice by applying for and obtaining the several continuances.

The initial error in the appellant's position is the assumption that a bastardy proceeding can be commenced only in the township in which the defendant resides.

Section 1441, R. S. 1881, prohibits the bringing of a suit before a justice of the peace against any person who is a resident of any township in the State, except in the township in which the defendant resides, unless the suit is commenced by a *capias ad respondendum*.

A proceeding in bastardy, although to all intents and purposes a civil action, is nevertheless commenced by making a written complaint under oath, and by the issuance of a warrant commanding the arrest of the defendant, and that he be brought before the justice to answer. According to the common law, a *capias ad respondendum* was a writ issued in a civil action by means of which the body of the defendant was taken into custody by the sheriff or other officer, and brought before the court on a day certain, for the purpose of compelling the defendant to answer the demand of his adversary. 1 Tidd Pr. 128; Am. & Eng. Encyclo. of Law.

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Any civil suit or proceeding in which the original process provided by statute is a writ or warrant, commanding the arrest of the defendant, and that he be brought before the court to answer a demand made against him, is a suit commenced by a *capias ad respondendum*. Such process, issued by a justice of the peace, runs anywhere within the county. It can only be served by taking the defendant into custody and bringing him before the court, and this may be done wherever the defendant may be found within the county in which he resides. Proceedings in bastardy are, therefore, commenced by *capias*, and, in cases thus commenced, the jurisdiction of justices is not limited to their townships, but is co-extensive with the county in which they reside. It follows, regardless of whether or not the appellant had waived his right to plead to the jurisdiction of the justice, that the finding and judgment of the court on the issue made on the plea in abatement was right.

The examination before the justice resulted in the discharge of the defendant. Subsequently, upon a trial had in the circuit court, he was found to be the father of the relatrix's child, as charged in the complaint, and the court adjudged that he should pay four hundred dollars to the relatrix for the maintenance and education of her child, and that he should stand committed until the judgment, which was payable in four instalments of one hundred dollars each, was paid or replevied.

The record fails to show affirmatively that an appeal had been taken to the circuit court from the judgment of the justice of the peace, nor does it appear from the record how or by whom the case was brought into the circuit court.

It is insisted that, because the record is in the condition above mentioned, the circuit court acquired no jurisdiction of the subject-matter. There is no merit in this point.

It has been repeatedly ruled that the general statute authorizing appeals to the circuit court, from the judgment of any justice, is applicable to bastardy proceedings, and that the

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State may appeal in such a case. *Galvin v. State, ex rel.*, 56 Ind. 51; *Reed v. State, ex rel.*, 66 Ind. 70; 2 Works Pr., section 1366.

Since an appeal might have been taken by the State, we must presume, until the contrary appears, that one was taken, and that the circuit court thus acquired jurisdiction by an appeal regularly taken. *Unruh v. State, ex rel.*, 105 Ind. 117, and cases cited.

It was ordered that the deferred payments should draw interest at the rate of six per cent. per annum. The appellant moved the court to modify its judgment in that regard, and it is contended, lastly, that error was committed in overruling this motion.

It was within the discretion of the court, in making such order as to it seemed just for the maintenance and education of the child, to render its judgment so that the deferred payments should draw interest. Section 992, R. S. 1881.

The judgment is affirmed, with costs.

Filed April 12, 1888.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—The process which issues in a prosecution for bastardy is essentially different from an ordinary summons in a civil action. It is a warrant requiring the officer to bring the body of the defendant into court. A writ, in the nature of a warrant, is not limited to the township, but extends to the entire county.

The circuit court is a court of general jurisdiction, and having entertained jurisdiction of the appeal from the justice of the peace, we must presume, the contrary not appearing, that the circuit court had jurisdiction of the appeal in this instance. *Bass Foundry and Machine Works v. Board, etc.*, ante, p. 234.

Petition overruled.

Filed June 19, 1888.

No. 13,860.

MULCAHEY v. GIVENS.

INTOXICATING LIQUOR.—Act of 1875.—Sale to Intoxicated Person.—Damages.—Civil Action.—Right to Maintain.—The right to prosecute a civil action under sections 15 and 20 of the act of 1875 (1 R. S. 1876, p. 869), to recover damages sustained by the sale of alcoholic liquors to a person in a state of intoxication, is not affected by section 2092, R. S. 1881, subsequently enacted.

SAME.—Proximate Cause of Injury.—Where intoxicating liquor is sold to a person at the time intoxicated, who, by reason of the effect thereof, becomes unable to manage the horses drawing himself and wife homeward, but refuses to relinquish the reins to his wife, whereby the vehicle in which they are riding is overturned, and both are injured, the sale of the liquor is such a proximate cause of the injuries as entitles the wife to maintain an action under the act of 1875 for damages.

SAME.—Action Against Vender Personally.—Bond.—An action against a licensed vender under the act of 1875 for damages resulting from the sale of intoxicating liquor to an intoxicated person, may be maintained either against the vender personally or upon his bond.

From the Newton Circuit Court.

E. P. Hammond, W. H. H. Graham and D. L. Bishop,
for appellant.

S. P. Thompson, for appellee.

NIBLACK, C. J.—This action was brought by Winifred Mulcahey against James F. Givens, under sections fifteen (15) and twenty (20) of the act of 1875, regulating the sale of intoxicating liquors. 1 R. S. 1876, p. 869. The complaint is in two paragraphs.

It is alleged in both paragraphs that, since the 25th day of December, 1882, the plaintiff has been the wife of one Michael Mulcahey, upon whose labor and industry she was wholly dependent for her support and maintenance prior and up to the happening of the grievances for which this action is prosecuted; that, on the 28th day of January, 1886, the plaintiff and her said husband came to the town of Rensse-

115	286
120	301
123	135
115	286
1156	473
156	476
115	286
166	602

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laer from their home in the country, a distance of six miles, in a sleigh drawn by two horses, which were driven by her husband; that while in said town of Rensselaer on that day, the said Givens, who was a licensed vendor of intoxicating liquors therein, unlawfully sold to the said Michael Mulcahey, who was at the time in a state of intoxication, and known to be in that condition by him, the said Givens, six drinks of intoxicating liquors, for the price of ten cents for each drink, which liquors he, the said Michael, then and there drank; that immediately thereafter the plaintiff and the said Michael started home in the sleigh in which they had come; that from the effects of said intoxicating liquors so sold to and drank by him, the said Michael became extremely intoxicated and unable to control or manage the horses attached to such sleigh; that he nevertheless persisted in attempting to drive said horses, and would not permit the plaintiff to drive them; that by reason of such extreme intoxication, and of his incapacity resulting therefrom to control and manage said horses, the said Michael suffered, caused and permitted the horses to upset the sleigh.

It is averred in the first paragraph that, in the upsetting of the sleigh, the plaintiff was violently thrown to the ground and that the sleigh was thrown heavily upon her, whereby she was badly bruised, wounded and injured, to her great damage.

The second paragraph averred that, by the upsetting of the sleigh, the said Michael was also thrown violently to the ground and that the sleigh fell upon him with great force, whereby he was wounded, maimed and paralyzed so that he has ever since been wholly unable to perform any labor whatever and has become permanently disabled; that the plaintiff has thereby been greatly injured in her means of support.

A demurrer was sustained to both paragraphs of the complaint and the defendant had final judgment upon demurrer.

While the record discloses nothing as to the ground upon

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which the demurrer was sustained, it has been conceded in argument that it was upon the theory that sections fifteen (15) and twenty (20) of the act of 1875 were, so far as they might have had an application to the facts of this case, impliedly repealed by section 2092, R. S. 1881, and that hence there was, at the time this action was commenced, no law in force authorizing the prosecution of a civil action for the alleged injuries resulting from the unlawful conduct of Givens.

Sections 15 and 20 are respectively as follows: "Section 15. Any person who shall sell, barter, or give away any spiritous, vinous or malt liquors to any person at the time in a state of intoxication, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than ten nor more than fifty dollars."

"Section 20. Every person who shall sell, barter, or give away any intoxicating liquors, in violation of any of the provisions of this act, shall be personally liable, and also liable on his bond filed in the auditor's office, as required by section 4 of this act, to any person who shall sustain any injury or damages to his person or property or means of support, on account of the use of such intoxicating liquors, so sold as aforesaid, to be enforced by appropriate action in any court of competent jurisdiction." R. S. 1881, section 5323.

Section 2092, R. S. 1881, which came into force on the 19th day of September, 1881, is in these words: "Whoever sells, barter, or gives away any spiritous, vinous, malt, or other intoxicating liquor to any person at the time in a state of intoxication, knowing him to be in a state of intoxication, shall be fined not more than one hundred dollars nor less than ten dollars, to which may be added imprisonment in the county jail not more than one year nor less than thirty days, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period."

As applicable to the facts relied on for a recovery in this action, section 20 ought to be construed as if it read, "Every

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person who shall barter or give away any spiritous, vinous or malt liquors to any person at the time in a state of intoxication, shall be personally liable, and also liable on his bond * * * * to any person who shall sustain any injury or damage to his person or property, or means of support, on account of the use of such intoxicating liquors."

As thus construed, the right to prosecute a civil action under that section for the sale of alcoholic liquors to a person in a state of intoxication, was neither abridged nor taken away by the subsequent enactment of section 2092, above set out.

There is no inconsistency between so much of section 15 as constructively entered into, and became a part of, section 20, as above stated, and section 2092, and hence that part of section 15 still continues in force in support of a civil action for a violation of its provisions and any consequent injury which may ensue therefrom. This conclusion is fully sustained by the recent case of *State, ex rel., v. Cooper*, 114 Ind. 12. See, also, *Bishop on the Written Laws*, section 181; *Alexander v. State*, 9 Ind. 337; *Martindale v. Martindale*, 10 Ind. 566; *Cordell v. State*, 22 Ind. 1; *State v. Miller*, 58 Ind. 399; *Gorley v. Sewell*, 77 Ind. 316; *Capron v. Strout*, 11 Nev. 304; *Commonwealth v. Kendall*, 144 Mass. 357; *Fullerton v. Spring*, 3 Wis. 667; *Randolph v. Larned*, 27 N. J. Eq. 557.

The additional point is made that the sale of the intoxicating liquors to the plaintiff's husband was not, within the proper meaning of that term, the proximate cause of the injuries of which she complains; that such injuries could not reasonably have been anticipated by Givens when he sold the liquors as charged, and the cases of *Krach v. Heilman*, 53 Ind. 517, *Collier v. Early*, 54 Ind. 559, and *Backes v. Dant*, 55 Ind. 181, are cited as supporting that view of the doctrine of proximate cause in cases of the class to which this belongs.

These cases do lend support to this additional point made

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against the sufficiency of the complaint, but they arose and were decided under an older, and, in some respects, a different and more exceptional, statute than the one now before us. They were, nevertheless, held to be against the weight of authority, and not binding as precedents in similar cases brought under the act of 1875, in the later case of *Dunlap v. Wagner*, 85 Ind. 529 (44 Am. R. 42), and we still adhere to that interpretation of those cases. In so far as they are inconsistent in principle with the case of *Dunlap v. Wagner*, *supra*, they must be regarded as having been overruled.

As the facts are stated in this last named case, a stronger and more direct case was seemingly made against Wagner than the complaint does in this case against Givens, but the conclusions reached, and the general principles recognized in that case, sustain the sufficiency of the complaint in this, as regards the proximate cause of the injuries sued for, and we are content to rest this case in the respect stated upon the conclusions and general principles there announced.

The further point is made that an action like the one at bar, when prosecuted against a licensed vender of intoxicating liquors, must be upon the bond given by him under section four (4) of the act of 1875, and that, consequently, an action will not lie against him alone for a violation of any of the provisions of that act. This point has the merit of plausibility, but we see no sufficient ground upon which it can be sustained. Section 20 authorizes an action in general terms against the vender personally as well as upon his bond, thus fairly implying that the plaintiff has an option either to sue the vender alone, or to sue him and his sureties together on his bond. This view is impliedly supported by the case of *Kane v. State, ex rel.*, 78 Ind. 103, and is, as we believe, in accordance with the legislative intention on the subject.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Filed June 22, 1888.

Blackmer, Treasurer, v. The Royal Insurance Company *et al.*

No. 9893.

115	291
115	596
120	583

BLACKMER, TREASURER, v. THE ROYAL INSURANCE COMPANY ET AL.

FOREIGN INSURANCE COMPANIES.—Retaliatory Statute.—Constitutionality.—

Section 3 of the act of March 3d, 1877 (section 3773, R. S. 1881), regulating foreign insurance companies doing business in this State, and containing provisions of a retaliatory character, is constitutional and valid. *State, ex rel., v. Insurance Company of North America, ante*, p. 257, followed.

SAME.—City.—Right to Recover Per Cent. of Premiums for Use of Fire Department.—Neither such section 3 of the act of 1877, nor any other statute of this State, authorizes a city or town to recover from a foreign insurance company, for the use of its fire department, a per cent. of the premiums received from risks taken upon property within the municipality, as provided by the laws of the State where such company was incorporated, or where, being organized abroad, it has its principal agency, as the entire regulation of such companies and the collection of taxes therefrom are committed by the laws of this State to the State officers.

From the Tippecanoe Circuit Court.

J. R. Carnahan, for appellant.

F. M. Finch, J. A. Finch, J. E. McDonald and J. M. Butler, for appellees.

HOWK, J.—In this case appellant, Blackmer, treasurer of the city of Lafayette, on behalf of the fire department of said city, sued the defendants, the Royal Insurance Company of Liverpool, and Edward Groenendyke, agent of such company at said city of Lafayette.

Defendants separately demurred to the complaint herein, upon the ground that it did not state facts sufficient to constitute a cause of action. These demurrers were sustained by the court below, and to these rulings plaintiff excepted, and, declining to amend, the court adjudged that he take nothing by his suit, and that defendants recover of him their costs.

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Plaintiff has appealed, and has here assigned as errors the sustaining of the demurrers to his complaint.

Plaintiff alleged in his complaint that said Royal Insurance Company was duly incorporated under the laws of England for the purpose of taking risks against loss or damage by fire, and had elected to make its place of deposit and establish its principal agency in this country, in the city, county and State of New York; that said insurance company, by its agent and co-defendant, Groenendyke, had been carrying on the business of fire insurance in said city of Lafayette continuously since March 3d, 1877; that said insurance company, by its agents, had received as premiums on insurance against loss or damage by fire, upon property situate within the corporate limits of said city of Lafayette, since March 3d, 1877, and prior to September 1st, 1879, the sum of \$10,000; that the city of Lafayette had, under the control of its common council, an organized fire department, which department had no treasurer; that as treasurer of such city plaintiff had authority to collect all moneys due said fire department, for the use and benefit thereof, from insurance companies transacting fire insurance within said city, organized under the laws of any other nation and country, but having their principal place of deposit, and principal agency in the United States for the transaction of business, in another State than the State of Indiana, and not incorporated under the laws of this State.

Plaintiff then set out in his complaint section 3 of the amendatory and supplemental act of March 3d, 1877, regulating foreign insurance companies doing business in this State (section 3773, R. S. 1881), as follows:

“When, by the laws of any other State, any taxes, fines, penalties, licenses, fees, deposits of money or securities, or other obligations or prohibitions are imposed upon insurance companies of this or other States, or their agents, greater than are required by the laws of this State, then the same obligations and prohibitions, of whatever kind, shall, in like

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manner for like purposes, be imposed upon all insurance companies of such States and their agents. All insurance companies of other nations, under this section, shall be held as of the State where they have elected to make their deposit and establish their principal agency in the United States."

Plaintiff then averred that the Legislature of the State of New York, on the 19th day of May, 1876, enacted a law entitled "An act to require the payment of certain premiums to the fire departments of cities and incorporated villages by fire insurance companies, not organized under the laws of the State of New York, but doing business therein;" that, by such law, it was provided as follows:

"There shall be paid to the treasurer of the fire department of every city or incorporated village of this State, for the use of such fire department, and when no treasurer of a fire department exists, then to the treasurer of such city or village, who, for the purposes of this act, shall have the same powers as the treasurers of fire departments, on the 1st day of November of each year, by every person who shall act as agent for or on behalf of any individual or association of individuals, not incorporated under the laws of this State, to effect insurance against loss or injury by fire upon property in this State, although such individual or association may be incorporated for that purpose by any other State or country, the sum of two dollars upon the hundred dollars, and that rate upon the amount of all premiums which, during the year or part of a year ending on the last preceding first day of September, shall have been received by such agent or person, or received by any other person for him, or shall have been agreed to be paid for any insurance effected, or agreed to be effected, or promised by him as such agent, or otherwise to be effected, against loss or injury by fire upon property situate within the corporate limits of such city or village."

Plaintiff further averred, that the law last quoted was still in force in the State of New York and applicable to fire

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insurance companies of this and other States; that, by said law, there was collectible from fire insurance companies of this and other States the sum of \$2 upon the \$100, and at that rate upon all premiums which had been received, and had been agreed to be paid, for insurance effected against loss and injury by fire upon property within the corporate limits of the city or incorporated village where such company should transact business within the State of New York; that said tax and fee of two per cent., so imposed by said law of the State of New York was, by that amount, greater than was imposed and required for a like purpose by the laws of this State from insurance companies of other States doing business in this State; that, by reason of the premises, defendants were indebted to the fire department of said city of Lafayette in the sum of \$200, being two per centum of the amount of money received and agreed to be paid to said Royal Insurance Company, defendant, for insurance effected and agreed to be effected against loss and injury by fire upon property within the corporate limits of the city of Lafayette, since March 3d, 1877, and prior to September 1st, 1879; and that said sum of money was then due, owing and wholly unpaid. Wherefore, etc.

Two questions are presented for decision by the record of this cause and the error assigned thereon, which may be thus stated, namely: 1. Is section 3 of the amendatory and supplemental act of March 3d, 1877 (section 3773, R. S. 1881), regulating foreign insurance companies doing business in this State, etc., a constitutional and valid law? And 2. Conceding such section 3 to be a constitutional and valid statute, does plaintiff's complaint herein state a case within its purview and within the intent of the law-making power of the State in its enactment?

The first of these questions we examined and decided, in the recent case of *State, ex rel., v. Insurance Co. of North America, ante*, p. 257. In the case cited, we held upon full consideration, as we do here, that such section 3 (section 3773,

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supra) is not in conflict with any provision of our fundamental laws, State or Federal, but is a constitutional and valid law. *Goldsmith v. Home Ins. Co.*, 62 Ga. 379; *Home Ins. Co. v. Swigert*, 104 Ill. 653; *Phoenix Ins. Co. v. Welch*, 29 Kans. 672; *People v. Fire Ass'n, etc.*, 92 N. Y. 311; *Phoenix Ins. Co. v. Burdett*, 112 Ind. 204.

2. We are of opinion that the second question above stated must be answered in the negative; that the case made by the facts averred in the complaint herein does not come within the scope of such section 3, or within the letter, spirit or intention of any of its provisions. The first valid legislation of this State, in relation to foreign insurance companies, *eo nomine*, was "An act regulating foreign insurance companies doing business in this State; prescribing the duties of the agents thereof, and of the auditor of state in connection therewith, and providing penalties for the violation of the provisions of this act," approved December 21st, 1865. Acts of 1865, Spec. Sess., p. 105, *et seq.* Such foreign insurance companies were not required to pay any taxes, or any money in the nature of taxes, by the provisions of this act. The only moneys which such companies or their agents were required to pay for any purpose by the above entitled act, were certain small fees to the auditor of state for his services under such act. On March 8th, 1873, an act was approved, entitled "An act supplementary and amendatory of an act entitled 'An act to provide for a uniform assessment of property and for the collection and return of taxes thereon,' approved December 21st, 1872." Acts of 1873, p. 205, *et seq.* Section 8 of this latter act reads as follows:

"Section 8. Every insurance company not organized under the laws of this State, and doing business therein, shall, in the months of January and July of each year, report to the auditor of state, under oath of the president and secretary, the gross amount of all receipts received in the State of Indiana, on account of insurance premiums for the six months

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last preceding, ending on the last days of December and June of each year, and shall, at the time of making such report, pay into the treasury of the State, the sum of three dollars on every one hundred dollars of such receipts, less losses actually paid within the State."

It will be seen from its provisions that this section of the statute provides for the assessment and payment semi-annually, by foreign insurance companies doing business in this State, of a tax on their premium receipts, less losses actually paid within the State, as revenue for State purposes. It was the first and only statute of this State providing for such taxation, during the period of time covered by plaintiff's alleged cause of action, and continued in force until it was superseded by section 6351, R. S. 1881, which became in force on March 29th, 1881. We have never had any statute which authorized the cities or incorporated towns of this State, or any of their officers, to assess or collect by any form of procedure of foreign insurance companies or their agents, transacting the business of insurance within their corporate limits, any such taxes as those described in the complaint herein. We are clearly of the opinion that plaintiff's pending action is not authorized by any of the provisions of section 3 of the amendatory and supplemental act of March 3d, 1877 (section 3773, *supra*), or by any other statute of this State. Indeed, it is apparent, we think, from the titles of the several acts in relation to foreign insurance companies, and from all the provisions of such acts, that the General Assembly committed, and intended to commit, the entire regulation of such companies, under the law, to the State officers exclusively, and especially the collection of all such taxes as were or might be assessed against such companies, as well under the provisions of such section 3 (section 3773, *supra*), as under those of said section 8, last above quoted.

Our conclusion is, therefore, that the court below committed

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no error in sustaining the separate demurrers of the defendants to the complaint herein.

The judgment is affirmed, with costs.

Filed June 22, 1888.

No. 13,374.

THE PEOPLE'S SAVINGS, LOAN AND BUILDING ASSOCIATION v. SPEARS ET AL.

JUDGMENT.—*Conclusiveness of.*—*Failure to Cover all the Issues.*—*Ejectment.*—*Quieting Title.*—Where, in a suit to recover possession of real estate and to quiet title, judgment is given against one defendant, following which is a recital that the rights of the other defendants have not been adjudicated, the recital is not conclusive, but the effect of the judgment is to be determined by the issues and finding in the case.

SAME.—*Amendment of Judgment.*—*Practice.*—The sufficiency of a judgment, as to matter of form, can not be questioned by a motion for a new trial assigning as a cause that the judgment is contrary to law; nor is such a motion a proper method by which to secure a modification or amendment, but the remedy is by a special motion for that purpose, questions on which are to be saved by bill of exceptions.

REAL ESTATE.—*Possession Under Contract of Purchase.*—*Mechanic's Lien.*—*Estoppel.*—Where one who is in possession of real property under a contract of purchase procures improvements to be made thereon, with the mere knowledge and consent of the vendor, the latter is not thereby estopped to assert his prior and recorded title as against one claiming title through the foreclosure of a mechanic's lien attempted to be asserted by the person making the improvements.

From the Clarke Circuit Court.

W. B. Goodwin, for appellant.

J. B. Meriwether, for appellees.

115	297
133	357
115	297
140	438
115	297
145	617
147	277
147	303
115	297
149	354
115	297
159	677
115	297
160	113
115	297
166	365

The People's Savings, Loan and Building Association v. Spears *et al.*

MITCHELL, J.—Action by the above named corporation against Andrew J. Spears, William Fawcett and Mary Jane Fawcett, to recover the possession of, and quiet title to, certain described real estate in the city of Jeffersonville. It is averred that the plaintiff is the owner of the land described in the complaint, in fee simple, and entitled to the possession thereof, which is wrongfully withheld by Spears, and that all the defendants claim some interest in the real estate adverse to the right and title of the plaintiff. The defendants answered jointly by a general denial.

Mrs. Fawcett filed a cross-complaint, in which she alleged, among other matters not material to be stated, that, in July, 1882, the defendant Spears, while in possession of the premises in controversy under a contract of purchase, and while exercising control and ownership over the property, with the knowledge and consent of plaintiff, employed the defendant William Fawcett to make some additions to, or repairs upon, a building situate on the premises, and that the latter had, by due compliance with the statute, acquired a mechanic's lien upon the land and building for the amount of the repairs so made.

It is averred that the lien had been foreclosed and the property sold to the cross-complainant, in pursuance of a decree of foreclosure taken by Fawcett against Spears, and that the cross-complainant had no notice of the claim or ownership of the plaintiff at the time she purchased at the foreclosure sale. She asked as relief that the interest thus acquired by her be declared superior to the plaintiff's title.

The court sustained a demurrer to the cross-complaint, whereupon, after taking an exception, leave was taken to amend. So far as appears, nothing further was done in respect to the cross-complaint. Subsequently the cause was tried, without the intervention of a jury, on the issue made by the general denial to the complaint.

The court found generally that the plaintiff was the owner in fee simple, and entitled to the possession of the real estate

The People's Savings, Loan and Building Association v. Spears *et al.*

described in the complaint, and that the possession was unlawfully withheld by Spears. Judgment against Spears for possession.

There is the following recital after the judgment: "It is, therefore, considered, ordered and adjudged that there has been in this action no adjudication as to any alleged or supposed right, title or interest of the other defendants, William Fawcett and Mary J. Fawcett, of any interest or claim which they, or either of them, may have to the real estate described in the complaint in this action."

The plaintiff moved the court for a new trial, assigning as ground therefor "that the decision of the court refusing to adjudicate and determine the matter in controversy between the plaintiff and the defendants William Fawcett and Mary Jane Fawcett is contrary to law."

This motion was overruled, and this ruling is the only error assigned by the appellant. Mary Jane Fawcett assigns as cross-error the ruling of the court in sustaining the demurrer to her cross-complaint.

In respect to the error assigned by the appellant, it may be remarked that it does not appear, by bill of exceptions or otherwise, that any objection was made in the court below to the form or substance of the finding and judgment, or that there was any effort, by motion or otherwise, to secure any amendment to or modification of the judgment. All that appears to have been done was to move for a new trial, assigning as cause therefor that the refusal of the court to adjudicate, etc., was contrary to law. The sufficiency of a finding or judgment, as regards mere matter of form, can not be questioned by a motion for a new trial, assigning as a cause therefor that the finding or decision is contrary to law, nor is a motion for a new trial the proper method by which to secure the modification or amendment of a finding or judgment. *Bosseker v. Cramer*, 18 Ind. 44; *Robinson Machine Works v. Chandler*, 56 Ind. 575; 1 Works Pr., section 916.

The People's Savings, Loan and Building Association v. Spears *et al.*

If a finding "is imperfect by reason of uncertainty or ambiguity, or by finding less than the whole matter put in issue, or by not assessing damages," a *venire de novo* may be awarded. *Pittsburgh, etc., R. W. Co. v. Hixon*, 110 Ind. 225; 2 Tidd Pr. 922.

In case the judgment fails to follow the finding, it may be corrected, modified or amended on motion for that purpose. Questions on such motions are saved by bill of exceptions. *Forsythe v. Kreuter*, 100 Ind. 27; *Adams v. LaRose*, 75 Ind. 471.

"Where any part of a judgment is valid, it will stand unless proper steps have been taken by objection duly presented to the trial court to secure a modification or amendment, by amending or rejecting the part which is wrong." *Bayless v. Glenn*, 72 Ind. 5. *Teal v. Spangler*, 72 Ind. 380; *Becknell v. Becknell*, 110 Ind. 42.

The recital in the record or order-book entry upon the subject of what had or had not been adjudicated in respect to the rights of William and Mary Jane Fawcett is not conclusive. A judgment is, or ought to be, conclusive upon the matters put in issue by the pleadings in the case. The general rule is, that the issuable facts or matters upon which the plaintiff's case proceeded determine what was in issue. *McFadden v. Ross*, 108 Ind. 512; *McFadden v. Fritz*, 110 Ind. 1; *Kilander v. Hoover*, 111 Ind. 10, and cases cited.

The findings should cover the whole issue, and the judgment should follow the finding. If less than the whole issue was found in the present case, the court would doubtless have corrected or amended its finding on motion, and if the judgment did not follow the finding, a motion to amend or modify would have been available. So far as the entry on the order-book assumes by a recital to determine what was or was not adjudicated, its effect is to be determined by the issues and finding in the case. There appears to be a general finding for the plaintiff, so far as the title and right of possession are concerned, but as the effect of the finding

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and the extent and conclusiveness of the judgment actually rendered are not before us, we decide nothing upon that subject now.

The demurrer to the cross-complaint was properly sustained. The fact that Spears was in possession under a contract of purchase, gave him no authority to overreach the plaintiff's title by contracting for repairs. Spears could bind his interest under his contract of purchase, and no more. Presumably the plaintiff's title was of record. That the purchaser in possession under a contract of purchase made improvements or repairs with the knowledge and consent of the vendor, did not estop the latter to assert its prior title. Something more than mere inactive consent is necessary in order that a lien may be acquired against the owner of property. *Neeley v. Searight*, 113 Ind. 316; *Hopkins v. Hudson*, 107 Ind. 191; *Wilkerson v. Rust*, 57 Ind. 172; *McCarty v. Burnet*, 84 Ind. 23.

As has been intimated, the cross-complaint does not seem to have been finally disposed of in the court below, and it is, therefore, doubtful whether the cross-error assigned presents any question for decision. It seems pertinent to suggest, that, after sustaining the demurrer to the cross-complaint—the cross-complainant having failed to avail herself of the leave to amend—the court would doubtless have sustained a motion for judgment upon the demurrer. *Hunter v. Pfeiffer*, 108 Ind. 197; *Bicknell Civil Pr.*, 107. There was no available error.

The judgment is affirmed, with costs.

Filed June 20, 1888.

Quick, Administrator, v. Durham.

No. 13,031.

QUICK, ADMINISTRATOR, v. DURHAM.

SET-OFF.—*Judgments.*—*Decedent's Estate.*—*Insolvency.*—*Tort.*—A. and B. effected an exchange of lands. Subsequently B.'s administrator, in an action originally commenced by B., obtained a judgment against A. for deceit as to the value of the land received in the transaction. Afterwards A. recovered a judgment against the estate of B. for money which he had been compelled to pay by reason of a breach of the warranty against encumbrances contained in the deed to him.

Held, that A. is entitled to have his judgment set off against the judgment in favor of the estate, although the estate is insolvent.

Held, also, that the judgment against A. was not for a tort, within the proper meaning of that term, but that even if it were, the circumstances make a case for an equitable set-off.

From the Montgomery Circuit Court.

N. P. H. Proctor, J. Wright and J. M. Seller, for appellant.

P. S. Kennedy, S. C. Kennedy, G. W. Paul and J. E. Humphries, for appellee.

NIBLACK, J.—This was a proceeding to have one judgment set off against another, and was based upon a motion in writing, having the form and similitude of a complaint, upon which an issue was formed by an answer in denial.

At the hearing the following facts were seemingly well established:

On the 2d day of June, 1883, Marquis L. Bass, then a resident of the city of Crawfordsville, in this State, conveyed to William H. Durham, the appellee in this appeal, and, also, a resident of the same city, a lot of ground, with buildings thereon, situate in said city of Crawfordsville, by warranty deed, for the alleged consideration of nine thousand and five hundred dollars. In part payment of this sum Durham conveyed to Bass several tracts of land in the State of Iowa. The transaction was in fact an exchange of lands, in which a certain difference was to be paid by Durham.

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Bass had never seen the Iowa lands thus conveyed to him, but accepted them solely upon the representations of Durham as to their location, quality and surroundings, as well as their value. A few months later, Bass, complaining that all the most material representations which Durham had made concerning these lands had proven to be untrue, commenced an action in the Montgomery Circuit Court against the latter for the alleged deceit which had been thus practiced upon him. Before the cause came on for trial Bass died, and Stebbins Quick, the appellant here, was appointed his administrator.

The subsequent proceedings were conducted in Quick's name, and he, as such administrator, on the 3d day of November, 1884, obtained a judgment against Durham for the sum of two thousand dollars in damages. During the pendency of this suit, and after Bass had died, that is to say, on the 8th day of September, 1884, Durham, alleging that he had been compelled to pay a large sum in excess of what he had agreed to pay, to relieve the property conveyed to him by Bass from encumbrances of various kinds, filed a claim in the same court against the estate of Bass for the gross sum so alleged to have been overpaid.

Upon issue joined and a trial, Durham, in January, 1885, obtained an allowance and judgment against the estate of Bass, in the hands of Quick to be administered, for the sum of eleven hundred and ten dollars.

Durham thereupon proceeded to make payments from time to time upon the judgment so rendered against him in favor of the estate of Bass, until he reduced the balance due upon it to about the sum of eleven hundred and twenty dollars, and then commenced this proceeding to have his judgment against the estate set off against, and applied to the extinguishment of, the balance so due upon the judgment against him. The court below, after hearing the evidence, came to the conclusion that the amount due for principal and interest on the judgment in Durham's favor, was greater than the balance

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remaining unpaid on the judgment against him, and that, notwithstanding the admitted insolvency of the estate of Bass, the former judgment should be set off against, and applied to the extinguishment of, the latter, and ordered accordingly.

It was contended below, *first*, through the medium of a demurrer to the complaint, *secondly*, by answer filed to the complaint, and *thirdly*, under the form of a motion for a new trial, that, owing to the insolvency of Bass's estate as well as to the difference between the nature and character of the two judgments, one was not a proper set-off against the other, and that contention is continued by this appeal and renewed in this court.

It has been decided, and that is now the accepted law on the subject, that a proceeding of this kind is a summary proceeding, and may be commenced by, and proceeded with, as upon a mere motion. Hence that no formal pleadings are necessary, but that the parties may, as in analogous cases, mutually resort to formal pleadings and present questions of law for decision in that way. *Puett v. Beard*, 86 Ind. 172 (44 Am. R. 280).

It has been said, and we have no doubt rightly said, in some of our decided cases, that the question as to whether a judgment in favor of an estate ought to be set off and cancelled by one against it, is not affected by the solvency of the estate on the one hand, or its insolvency on the other. *Convery v. Langdon*, 66 Ind. 311; *Carter v. Compton*, 79 Ind. 37.

If at the time of the death of the decedent the equities existing between him and one of his seeming debtors are such that the judgments which may be rendered on their respective claims ought to be set off one against the other, and that is accordingly done, then the judgment against the supposed debtor does not really constitute assets in the hands of the administrator, and the creditors have no lawful cause of complaint. This is upon the familiar principle that where

Quick, Administrator, v. Durham.

items in an account against one apparently indebted to an estate are absorbed and cancelled in the settlement of mutual accounts between him and the decedent, such items do not become assets of the estate, and the creditors have no claim upon them as such, either legal or equitable. If, in such a case, nothing is left for the creditors, they are in no worse condition than are other unfortunate creditors who have no means of enforcing payment from those indebted to them.

It is true, as contended, that one judgment can properly be set off against another only when equity and good conscience shall require that such an adjustment shall be made. *Puett v. Beard, supra*; *Beard v. Puett*, 105 Ind. 68.

Invoking the application of this rule, it is argued that as the judgment rendered against the estate of Bass was upon a breach of a contract of warranty, and that as the judgment against Durham was for a tort, there was no close analogy or homogeneity between the two judgments, and nothing in equity which either required or permitted them to be set off against each other.

In the first place, the judgment against Durham was not for a tort, within the proper meaning of that term. It was for alleged deceit in, and, consequently, for the breach of, a contract in the same general sense as that on which the judgment was rendered against the estate of Bass. Actions of tort, properly speaking, are for libel, assault, trespass, and cases of that general character. In the next place, there is no such distinction between judgments *ex contractu* and those *ex delicto* as is claimed. On the contrary, it has been expressly decided that a judgment of the one class will be set off against one of the other when equity and justice will thereby be best subserved. See *Carter v. Compton, supra*; *Puett v. Beard, supra*; *Butner v. Bowser*, 104 Ind. 255.

In the case before us, both controversies arose out of substantially the same transaction, and the judgments resulted from breaches of mutual and concurrent contracts. There

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were, therefore, good equitable reasons for setting off the judgments against each other. This view receives support in principle and by analogy from the case of *Judah v. Trustees of Vincennes University*, 16 Ind. 56.

The order appealed from is consequently affirmed, with costs.

Filed April 10, 1888; petition for a rehearing overruled June 23, 1888.

No. 13,205.

HOME INSURANCE COMPANY OF NEW YORK v. DAUBENSPECK.

INSURANCE.—Suspension of Company.—Promissory Note.—Failure of Consideration.—Where a person contracts for insurance for five years, pays the first year's premium in money, and executes a promissory note, payable in yearly instalments, for the balance, if the company issuing the policy becomes insolvent and suspends business before the expiration of the first year, the note can not be enforced, there being a failure of consideration.

From the Hamilton Circuit Court.

W. S. Christian and *I. W. Christian*, for appellant.

R. R. Stephenson and *W. R. Fertig*, for appellee.

MITCHELL, J.—Complaint by the Home Insurance Company of New York, as assignee of the American Insurance Company of Chicago, against Daubenspeck, on a promissory note dated the 20th day of July, 1880, stipulating for the payment of sixty dollars in four annual instalments of fifteen dollars each.

Home Insurance Company of New York v. Daubenspeck.

The defendant answered, first, by alleging that the note had been delivered to the American Insurance Company as part consideration for a policy of insurance, by the terms of which the company agreed to insure his property for a period of five years from a certain date, at the stipulated price of fifteen dollars per annum; that he had paid the premium for the first year in cash, and executed the note in suit for the premium for the remaining four years.

It was alleged in the answer that before the expiration of the first year the contract of insurance had been cancelled, that the defendant had paid the customary short rates and returned his policy to the company.

The second paragraph set up substantially the same facts as to the consideration, and in respect to the payment of the first year's premium in cash. It was then averred that before the expiration of the first year the American Insurance Company became insolvent, and suspended business, and that the consideration of the note had for those reasons failed. It is contended that the court erred in overruling the demurrer to the second paragraph of answer. The paragraph was clearly good.

There is no basis for the suggestion that the defendant got all he contracted for. He contracted for indemnity against loss or damage to his property by fire, and as a consideration therefor agreed to pay fifteen dollars annually for insurance for five years.

The demurrer admits, however, that the insurance company whose policy he held became insolvent and suspended business before the end of the first year. As a consequence, the company became unable to afford him the indemnity for which he contracted. How can it be said, therefore, that he received what he contracted for, and upon what principle should the defendant now be compelled to pay for that which the insurance company, because of its insolvency and suspension of business, became unable to furnish.

A policy in an insolvent, suspended insurance company is

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presumably worthless as a means of indemnity against future loss. The case is not controlled by *Myers v. Conway*, 62 Ind. 474.

The evidence fully sustains the finding upon the issue made by the first paragraph of the answer. There was, therefore, no error, even though the second paragraph may not have been proved. If one sufficient and complete defence was proved the finding of the court was proper.

Judgment affirmed, with costs.

Filed June 23, 1888.

115	308
123	12
115	308
164	135

No. 14,264.

GIESEKE, ADMINISTRATOR, v. JOHNSON.

PRINCIPAL AND SURETY.—*Payment by Surety.*—*Indemnity.*—*Promissory Note.*—*Attorney's Fees.*—*Decedent's Estate.*—Where a surety, in paying a promissory note executed by himself and his deceased principal, is not required to pay the attorney's fees for which the note provides, he is not entitled to recover such attorney's fees from his principal's estate, but he is entitled to recover the amount paid by him, with interest, and no more, his cause of action being not upon the note, but upon an implied promise of indemnity.

From the Knox Circuit Court.

H. S. Cauthorn and *J. M. Boyle*, for appellant.

T. R. Cobb and *O. H. Cobb*, for appellee.

ZOLLARS, J.—J. H. Gieseke and appellee executed a promissory note to the First National Bank of Vincennes in which was a stipulation for the payment of attorney's fees for its collection.

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Although not shown upon the face of the note, appellee was surety for Gieseke. Before the maturity of the note Gieseke died, and appellant was appointed administrator of his estate. After the maturity of the note appellee paid it, but paid no attorney fees. Subsequently he filed his claim against the estate of Gieseke, stating therein the amount thus paid, setting out a copy of the note, and claiming attorney's fees for its collection. The court below allowed the claim, and included in its judgment fifteen dollars as such attorney's fees.

Is appellee entitled to recover such attorney's fees? That is the only question for decision here.

We are satisfied that he is not. One sufficient reason why he is not is, that he is entitled to recover the amount paid to the bank, with interest, and no more. His right of action is for indemnity only, and rests upon an implied promise on the part of the principal. Hence it is that a surety can not maintain an action against his principal until he has paid something, and then only for the amount paid, with interest. In this State the rate of such interest is regulated by statute. R. S. 1881, section 1219. *Brandt Suretyship and Guaranty*, sections 176, 178; *Bonney v. Seely*, 2 Wend. 481; *Eaton v. Lambert*, 1 Neb. 339; *Blake v. Downey*, 51 Mo. 437; *Succession of Dinkgrave*, 31 La. Ann. 703; *Kendrick v. Forney*, 22 Gratt. 748; 1 White & Tudor Leading Cases in Eq. (4th Am. ed.) 225, and cases there cited, and 156, and cases there cited.

To say that, upon and by reason of the payment of the note by the surety, equity subrogated him to the rights of the creditor, and to go further and say that by reason of such subrogation he might maintain an action upon the note against the principal, would not aid the appellee in this case, for the action would still be for indemnity, and the amount of his recovery the amount which he paid to the bank, with interest. *Sheldon Subrogation*, section 105, and cases there cited.

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It is there said: "The subrogation of a surety will not be carried further than is necessary for his indemnity; if he buys up the security at a discount, or makes his payment in a depreciated currency, he can enforce it only for what it cost him."

In the case of *Kendrick v. Forney, supra*, in speaking of the rights of a surety to be subrogated to the rights and securities of the creditor, it was said: "He has no equity to be subrogated to the rights and securities of the creditor against the debtor for what he has not paid for him; but only for what he has paid for him. So that upon the principle of subrogation, as upon the implied contract of indemnity, the surety is not entitled to recover from the principal a greater amount than he has paid for him. He has an equity to be subrogated only for his indemnity in cases where the doctrine of subrogation will apply."

There was no subrogation or equitable assignment in the case before us for the one sufficient reason, without attempting to give others, that there is no equity requiring either, as the bank held no securities, funds, liens or equities against the principal debtor, or as a means of enforcing payment from him. And, as we have said, in substance, in this case appellee could not be benefited by any supposable subrogation, for the reason that he could recover nothing but a personal judgment against the principal maker of the note, and such judgment could not exceed in amount the sum paid by him to the bank, with interest.

By the terms of the note the makers agreed to pay to the bank reasonable attorney's fees for its collection, but the principal maker of the note did not thereby agree to pay to appellee, as his surety, such attorney's fees, nor any other amount. As already stated, the rights of the surety and the obligation of the principal, as between themselves, in a case like this, rest upon an implied promise on the part of the principal maker which arises under the law for the indemnity of the surety.

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The action by appellee, the surety, against the principal maker, is not upon the note, but upon the implied promise of indemnity. And hence it is that his right of action is not limited by the statute of limitations applicable to the note, but by the statute of limitations applicable to accounts and contracts not in writing which, in this State, is six years. And hence, too, it is not necessary, in a case like this, under our statute, which requires that when any pleading is founded on a written instrument or on account, the original or a copy must be filed with the pleading, that the note paid by the surety, or a copy, shall be filed with the complaint in an action by him against the principal for indemnity. See *Sexton v. Sexton*, 35 Ind. 88; *Arbogast v. Hayes*, 98 Ind. 26; *Lilly v. Dunn*, 96 Ind. 220 (227); *Harker v. Glidewell*, 23 Ind. 219; *Cameron v. Warbritton*, 9 Ind. 351; *White v. Miller*, 47 Ind. 385; 1 *White & Tudor Leading Cases* (4th Am. ed.), p. 145; *Neilson v. Fry*, 16 Ohio St. 552.

Upon any view that may be taken of the case, the attorney's fee should not have been allowed, and to that extent the judgment is too large.

If within sixty days appellee shall enter a remittal of fifteen dollars as of the date of the judgment, the judgment will stand affirmed, at his costs, otherwise reversed, at his costs.

Filed June 22, 1888.

No. 13,267.

KEISTER ET AL. v. MYERS.

MORTGAGE.—Mistake.—Mutuality.—Reformation.—Complaint.—Where a complaint seeking the reformation of a mortgage alleges that the mortgagors agreed to convey the whole of a certain tract of land as security for the debt, and that both parties intended that the entire tract should be included in the mortgage, but that by the mistake of the scrivener the description written in the mortgage covered only a part of the tract, a mutual mistake is sufficiently shown.

SAME.—Parties.—Assignment.—Where a mortgage has been assigned by the mortgagee, the latter is not a necessary or proper party to a suit by the assignee to secure its reformation.

SAME.—Estoppel.—Where a party accepts a mortgage, believing that all the land agreed to be covered by the mortgage is included in the description, the mortgagor is estopped to assert that he intentionally brought about or silently acquiesced in the discrepancy between the instrument and the agreement.

From the Fulton Circuit Court.

M. R. Smith, E. Myers and E. P. Ferris, for appellants.

J. Rowley and M. A. Baker, for appellee.

MITCHELL, C. J.—It is charged in a complaint by Elizabeth Myers against Keister and wife, that the defendants agreed to execute a mortgage conveying the whole of a certain tract of land in Fulton county, containing forty-three and a fraction acres, as security for a debt of five hundred dollars, evidenced by a promissory note, payable by Keister to Margaret Paffenberger, with interest.

It is alleged that notwithstanding the agreement to convey the entire tract as a security, and that both parties intended at the time the mortgage was signed and delivered that it should include the whole, yet, by a mistake of the scrivener, the description of the land mortgaged was so written that only an undivided one-third of the tract was covered by the mortgage, and that the mistake was not discovered until after the note had been assigned by the payee, by written endorse-

115	312
118	297
119	184
122	253
115	312
124	258
115	312
146	348

Keister *et al.* v. Myers.

ment thereon, to the plaintiff. Prayer for judgment on the note, and that the mortgage be reformed and foreclosed.

The court sustained a demurrer to the complaint, after which the plaintiff, with leave, and without objection, filed what purports to be an amendment to the complaint. The amendment consisted of a separate written statement, to the effect that certain designated words were to be stricken out of the complaint to which the demurrer had been sustained, and certain other words inserted in their stead.

The defendants first demurred to the amendment and afterwards to the complaint as amended. Both demurrers were in turn overruled, after which the defendants answered by a general denial, and upon the issue thus made the court found for the plaintiff.

Without seeming to sanction the anomalous method of amending a pleading adopted by the plaintiff, since the amendment was allowed by the court and treated as valid by the defendant, the case will not be reversed here because of the novel manner in which the amendment was brought about.

The appellants contend, however, that the complaint is insufficient to warrant the reformation of the mortgage, because it does not show the mutuality of the mistake complained of, within the rulings in *Allen v. Anderson*, 44 Ind. 395, *Baldwin v. Kerlin*, 46 Ind. 426, and cases of that class.

As has been seen, it was averred in the complaint that the mortgagors agreed to convey the whole tract as a security for the debt, and both parties intended at the time the transaction was consummated that the entire tract should be included in the mortgage, but by mistake of the scrivener, who presumably acted for both, the description was so written as to cover only the undivided one-third. This sufficiently disclosed a mutual mistake, within the rulings in *Baker v. Pyatt*, 108 Ind. 61, and *McCasland v. Aetna Life Ins. Co.*, 108 Ind. 130, in which what we regard as the better rule governing the subject under consideration is enunciated.

It was not necessary, in order to warrant a reformation of

Keister et al. v. Myers.

the mortgage, that the mortgagee should have been made a party. After she had assigned the note by endorsement thereon she was neither a necessary nor a proper party to the suit, since, so far as appears, all her interest in the note and mortgage had passed by the endorsement of the note to her assignee.

Courts of chancery lend their aid for the correction of mistakes in written instruments, to the original parties thereto, and to all those claiming under them in privity. *East v. Peden*, 108 Ind. 92, and cases cited.

As a matter of course, an instrument can not be corrected without affording parties whose rights are to be affected, or whose obligations are to be enlarged by the reformation, an opportunity to be heard. *Durham v. Bischof*, 47 Ind. 211.

The remaining question is whether or not the finding of the court that the mortgage ought to be reformed is sustained by the evidence.

There is no dispute but that the mortgagee loaned the money, the repayment of which was secured by the mortgage in suit, upon the express agreement that she was to have a mortgage upon the forty-acre tract, as it was called, upon which the mortgagors resided. Keister held the title to the land by two deeds, one from Sophia Lucas and her husband, which conveyed the undivided one-third, the other from Sophia Lucas, administratrix of the estate of Isaiah M. Carter, conveying the undivided two-thirds. When the parties went to the scrivener to have the mortgage prepared, Keister took with him the deed from Mrs. Lucas and her husband, which conveyed the undivided one-third only, and the scrivener followed the description as it was written in that deed.

The latter testified that he read the mortgage over in the hearing of the parties, and that no objection was made to the description. The mortgagee accepted the mortgage, and delivered the money without having observed or understood that the mortgage covered only the undivided one-third.

Keister *et al.* v. Myers.

She supposed that it was made in accordance with the agreement. The mortgagors did not testify one way or the other.

The point of the argument on appellants' behalf is, that the evidence entirely fails to show that the mortgagors were mistaken. On the contrary, it is said the evidence shows that they were not mistaken, but that in delivering the mortgage upon the undivided one-third of the land they did precisely what they intended.

This argument proves too much, and, therefore, it proves nothing. Without denying that they agreed to give a mortgage covering the entire tract, and that they received the mortgagee's money with knowledge that she intended to take, and supposed she was receiving, a mortgage corresponding with the agreement, the appellants say they intentionally delivered her a mortgage which only covered the undivided one-third of the land.

A party who admits that an instrument, which a court of equity is asked to reform, does not set forth the agreement as it was actually made, and as the other party believed it did, will not be heard to say that he intentionally brought about, or silently acquiesced in, the discrepancy between the instrument and the agreement as made. *Roszell v. Roszell*, 109 Ind. 354.

This will be regarded as an attempt merely to shift his position from that of one laboring under an innocent mistake, to that of a person deliberately intending to perpetrate a fraud. No advantage can be gained in a court of conscience by attempting such a change. A court of equity will not permit one party to take advantage and enjoy the benefit of the ignorance or mistake, either of law or fact, of the other, which he knew of and did not correct. *Hollingsworth v. Stone*, 90 Ind. 244; 2 Pom. Eq. Jur., section 847.

It can not be said as a matter of law that a party who accepts a mortgage with a wrong description, such as that contained in the instrument under consideration, is guilty of

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such negligence as to forfeit all right to relief in a court of chancery. *Morrison v. Collier*, 79 Ind. 417; *Baker v. Pyatt*, *supra*.

There was no error. The judgment is affirmed, with costs.

Filed May 18, 1888; petition for a rehearing overruled June 20, 1888.

No. 13,388.

THE BOARD OF COMMISSIONERS OF RIPLEY COUNTY
v. HILL ET AL.

PLEADING.—*Motions to Strike Out and to Make Specific.—Supreme Court.—*

Practice.—To present any question to the Supreme Court upon the overruling by the trial court of motions to make a pleading more specific or to strike out parts thereof, the motions, rulings and exceptions must be brought into the record by bill of exceptions or order of court.

SAME.—*Uncertainty.—How Reached.*—A complaint is not vitiated by uncertainty in some of its allegations when it states a cause of action exclusive of such allegations; nor can mere uncertainty therein be taken advantage of by demurrer for want of facts, but the proper remedy is by motion to make specific.

SAME.—*Contract.—Plaintiff's Non-Performance.—Defendant May Plead in Bar.*

—While a party who sues for the breach of a contract must allege performance on his part, in order that his complaint may state a cause of action sufficient to withstand a demurrer, yet the defendant may, if he so elects, plead the plaintiff's non-performance in bar of the action.

GRAVEL ROAD.—*Contractor's Bond.—Action Upon.—Complaint.*—A complaint by the board of county commissioners upon a bond executed by a gravel road contractor to secure the performance of his contract, alleging a failure of the contractor to complete the work as agreed, is bad as to all the defendants if it fails to allege that the board had performed its part of the contract, or to show a sufficient excuse for its non-performance, the cause of action being primarily founded upon the contract.

115	316
124	299
127	505

115	316
132	29
132	217

115	316
146	471
147	508

115	316
148	473
149	369

115	316
153	256
153	278

115	316
158	309

115	316
159	595

115	316
163	647
163	648

115	316
168	600

115	316
169	86

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SAME.—Estimates.—Withholding Money From Contractor.—Where the contract for the construction of a gravel road stipulates that the engineer in charge of the construction of the work shall give the contractor estimates at the end of each thirty days, upon which the latter shall be paid a certain per cent. of the amount due for work done, the fact that money to which the contractor is entitled for work already performed is withheld, whereby he is prevented from completing the work as agreed, is a good defence to an action upon the bond given by him to secure the performance of his contract.

SAME.—Misconduct of Engineer.—Damages.—Liability of County.—A county is not liable to a gravel road contractor for damages sustained by him by reason of the failure of the engineer in charge of the construction of the work, to give him sufficient estimates, or for other delinquencies on his part, whereby such contractor is prevented from completing the road and is deprived of the profits which would have accrued to him.

From the Jennings Circuit Court.

E. P. Ferris, J. L. Benham, J. Overmeyer, A. G. Smith, W. W. Spencer and J. S. Ferris, for appellant.

J. G. Berkshire, T. C. Batchelor, J. B. Rebuck, C. H. Willson, J. E. McDonald, J. M. Butler and A. L. Mason, for appellees.

HOWK, J.—This suit was commenced by appellant, as plaintiff, against appellees, John F. Hill, Ewing H. Rowe and Rezin Johnson, as defendants, in the Ripley Circuit Court. Appellant's complaint was in two paragraphs, each of which counted upon a certain writing obligatory, executed by appellees to the appellant, of which the following is a copy :

“ Know all men by these presents, that we, John F. Hill, Ewing H. Rowe and Rezin Johnson are held and firmly bound unto the board of commissioners of Ripley county, State of Indiana, in the penal sum of seven thousand dollars, for the payment of which, well and truly to be made, we bind ourselves jointly and severally, and our heirs, executors and assigns, firmly by these presents. Sealed and dated this 21st day of April, 1885.

“ The condition of the above obligation is such that,

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whereas Calvin Carter, engineer of the Versailles and Dillsborough Free Gravel Road, by and with the approval of the board of commissioners of Ripley county, Indiana, has this day entered into a contract with the above bound John F. Hill for the construction of the said free gravel road, as, also, for making abutments and bridges along the said road, as per plans and specifications and profile of said route, which are made a part of said contract.

“Now, if the said John F. Hill shall well and truly perform said work, and in all things in compliance with said contract, and shall pay for all material and pay all debts incurred in the prosecution of said work, including board for laborers thereon, and in all things comply with said contract as to the construction and completion of said work, then this bond shall be void, else to remain in full force and effect. Witness our hands and seals this 21st day of April, 1885.”

(Signatures omitted.)

In each paragraph of its complaint appellant assigned, substantially, the same breaches of the condition of the foregoing bond, namely, that appellee Hill had failed to comply with or complete his contract within the time specified therein, and had abandoned such contract.

Answers were filed by the appellees, and appellee Hill separately filed his cross-complaint herein. The venue of the cause was changed to the court below, and the issues joined upon the complaint and cross-complaint were there tried by a jury, and a verdict was returned for the appellees upon appellant's complaint, and for appellee Hill on his separate cross-complaint, assessing his damages by reason of the matters therein stated in the sum of \$1,670. Over appellant's motion for a new trial, the court adjudged that it take nothing by its suit, that appellees recover their costs, and that appellee Hill recover of it his damages, assessed in the sum of \$1,670, and also his costs herein expended.

In this court appellant has assigned nineteen errors upon the record of this cause, and cross-errors have been assigned

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jointly by all the appellees, also by appellees Rowe and Johnson jointly, and separately by appellee Johnson.

As these cross-errors call in question here the sufficiency, both in form and substance, of each of the paragraphs of appellant's complaint, and the rulings of the court below upon motions to strike out, motions to make more specific, and demurrers for the alleged want of facts, addressed by appellees to such several paragraphs of complaint, or the exhibits therewith filed, we will first consider and decide such of the questions thereby presented as appellees' learned counsel have discussed in their exhaustive briefs of this cause.

1. In the first paragraph of its complaint the board of commissioners of Ripley county, plaintiff and appellant herein, alleged that, on the 21st day of April, 1885, appellee Hill entered into a contract with one Calvin Carter, engineer, with the approval of appellant, for the construction and completion, under the free gravel road law of this State, of what was known as the Versailles and Dillsborough Free Gravel Road, by grading, macadamizing, draining and gravelling such road from Versailles to the eastern boundary of Ripley county, a distance of eight miles, in sections of one mile each, beginning at Versailles and numbering east, all within such county; also, to build the abutments for a bridge over Laughrey Creek at Bushing's Ford; and, also, to build the abutments and put on iron bridges at two certain points on Rocky-run Branch, all according to certain plans and specifications then on file in the auditor's office of such county, which plans and specifications were made part of said contract; that it was further agreed in such contract that said work should be completed, as specified in such plans and specifications, on or before the 1st day of November, 1885; that at the time of the execution of such contract, and as a part thereof, the appellees executed a bond to the appellant in the penal sum of \$7,000, for the faithful performance of the aforesaid contract, which bond was duly accepted by appellant, and such contract was duly awarded to appellee Hill.

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Copies of which bond, contract and specifications were filed with, and made parts of, such paragraph of complaint.

And appellant averred that appellee Hill had wholly failed to comply with his said contract with Calvin Carter, engineer as aforesaid, by wholly failing and refusing to complete such contract, although often requested so to do before the commencement of this action ; that the aforesaid road, when completed according to contract, would be of the value of \$14,000 to appellant and Ripley county, upon which road appellant had paid appellee Hill, on said engineer's estimates, the sum of \$4,000 ; and the time having expired for the performance of such contract, appellee Hill had wholly, intentionally, fraudulently and wilfully abandoned said contract, to appellant's damages in the sum of \$7,000. Wherefore, etc.

In the second paragraph of its complaint, appellant alleged substantially the same facts as in its first paragraph of complaint, with only slight changes in verbiage and phraseology.

In the third paragraph of its complaint, after stating the substance of the contract between it and appellees, as the same was stated in the first and second paragraphs of its complaint, appellant averred that, before the completion of such contract, appellee Hill the principal in the bond in suit, wherein the other appellees were his sureties, abandoned such contract and failed to complete the same within the time and in the manner stipulated therein ; that appellant had performed on its part all the conditions of such contract, and had paid appellee Hill, on such engineer's estimates, the sum of \$4,000, and had been compelled, in order to get said work completed, to re-let the same to other parties and to obligate itself to pay such other parties the sum of \$1,500 more for such work than it had agreed to pay appellee Hill therefor as aforesaid. Wherefore, etc.

Appellees' cross-errors, which are predicated upon the overruling of their motions to strike out or reject the exhibits filed with the several paragraphs of appellant's complaint, and their motions to make the allegations of such

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paragraphs more certain and specific, present no question for the decision of this court. This is so, because neither of such motions, nor the rulings of the court thereon, nor appellees' exceptions to such rulings, were made parts of the record of this cause either by bills of exceptions or by orders of court. Section 650, R. S. 1881; *Berlin v. Oglesbee*, 65 Ind. 308; *Peck v. Board, etc.*, 87 Ind. 221; *Laverty v. State, ex rel.*, 109 Ind. 217.

The other cross-errors assigned by all the appellees, by appellees Rowe and Johnson, and separately by appellee Johnson, call in question the sufficiency of the facts stated by appellant, in each paragraph of its complaint, to constitute a cause of action, and to withstand their respective demurrers thereto for the alleged want of facts.

It is manifest, we think, from what we have already said, that appellant's cause of action, as stated in each paragraph of its complaint herein, is primarily founded upon the written contract or agreement entered into, with its approval, by and between Calvin Carter, its engineer, and appellee John F. Hill. It was necessary, therefore, that appellant should, in each paragraph of its complaint, state sufficient facts to constitute a cause of action in its favor and against appellee Hill, by reason or on account of his non-compliance with the terms and conditions of the aforesaid contract or agreement, on his part to be kept and performed. If any one of such paragraphs failed to state a cause of action against appellee Hill, growing out of or founded upon his aforesaid contract or agreement, it is very clear, we think, that such paragraph could not and did not state sufficient facts to constitute a cause of action in appellant's favor, and against all the appellees, upon the bond in suit executed by them as aforesaid.

In such contract or agreement appellant agreed to pay appellee Hill for his work in accordance with his bid, at the end of each thirty days, upon the estimates of said engineer, eighty-five per cent. of the amount due upon said work, etc.,

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and, further, that he should be paid two dollars per cubic yard for retaining walls.

If appellant had sued appellee Hill alone to recover damages for his alleged failure to comply with the terms of such contract or agreement, without reference to the bond counted upon herein, and had not alleged generally, in its complaint in such suit, that it had performed all the conditions of such contract on its part, or had not shown by proper averment a sufficient excuse for its non-performance of such conditions, it is certain, we think, that such complaint would have been insufficient on demurrer thereto for the want of sufficient facts. This rule of pleading is in harmony with the provisions of our civil code, and is approved and followed in many of our decided cases. Section 370, R. S. 1881; *Home Ins. Co. v. Duke*, 43 Ind. 418; *Armstrong v. Rockwood*, 53 Ind. 506; *American Ins. Co. v. Leonard*, 80 Ind. 272; *Bertelson v. Bower*, 81 Ind. 512; *Fairbanks v. Meyers*, 98 Ind. 92.

In the case in hand appellees' learned counsel vigorously contend that the first and second paragraphs of appellant's complaint herein were clearly bad on their demurrers thereto for the alleged insufficiency of the facts therein, because it was not alleged generally in either of such paragraphs that appellant had performed all the conditions of the contract therein described on its part, nor was any sufficient excuse shown in either paragraph for its non-performance of such conditions. We are of opinion that this objection to the sufficiency of the first and second paragraphs of complaint is well taken as to each of such paragraphs, and that appellees' demurrers thereto, for the alleged want of facts, ought to have been sustained.

Appellees' counsel concede in argument that the third paragraph of appellant's complaint is not open to the objection urged by them to the first two paragraphs thereof; because, as we have seen, appellant alleged generally in such third paragraph that it had performed on its part all the conditions of such contract.

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Counsel earnestly insist, however, that the third paragraph was bad on the demurrers thereto, because of the vagueness and uncertainty of the averments therein in relation to the re-letting of the work which appellee Hill had contracted to do, and to the increased liability incurred by appellant by reason of such re-letting of such work. Counsel say: "It is not averred that the plaintiff has paid, or will ever be called on to pay, one cent upon or on account of the second letting. It is not averred that the parties to whom the work was re-let have ever done one lick of work upon the contract, or that they will ever do a dollar's worth of work on it. In short, there is not an averment in this third paragraph that shows a valid re-letting of the contract to build the turnpike, or that the county has become, or will ever be, liable to pay one cent on account of the re-letting." No doubt the third paragraph of appellant's complaint was justly open to the criticism of counsel, for uncertainty in its statement of the facts in regard to the re-letting of the work. But if this statement was wholly rejected, the third paragraph of complaint would yet state facts amply sufficient, we think, to withstand the appellees' demurrers thereto and to require them to answer. This is so because, while it was alleged in such paragraph that appellant had performed all the conditions of the contract between it and appellee Hill on its part, it was further alleged therein that, before the completion of his contract, appellee Hill abandoned the same and failed to complete the work within the time and in the manner stipulated therein. Besides, it was long since settled by our decisions, that uncertainty, merely, in the averments of a pleading, could not be reached or taken advantage of as error by a general demurrer for the alleged want of facts, but only by a motion to make the pleading or the particular averment thereof more certain and specific. *Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297; *Jameson v. Board, etc.*, 64 Ind. 524; *Nowlin v. Whipple*, 79 Ind. 481; *City of Evansville v. Worthington*, 97 Ind. 282; *Cleveland, etc., R. W. Co. v. Wynant*,

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100 Ind. 160 ; *Pittsburgh, etc., R. W. Co. v. Hixon*, 110 Ind. 225.

We pass now to the consideration of such of the errors assigned by appellant as have been discussed here by its learned counsel. The first four of these alleged errors are predicated upon the overruling of appellant's demurrers to each of the second, third, fourth and fifth paragraphs of the joint answer of all the defendants to the complaint herein. The first paragraph of such answer was a general denial of the complaint herein. In the second paragraph of their joint answer, defendants alleged that, on the 21st day of April, 1885, defendant Hill entered into the contract, filed with the complaint herein, with Calvin Carter, engineer, and the board of commissioners of Ripley county, for the construction of the Versailles and Dillsborough Free Gravel Road, including the excavations, masonry and abutments for a bridge over Laughrey creek, and for bridges on Rocky-run creek and the iron bridges over such creek, complete and ready for use and travel, according to the plans, specifications and profile for such road then on file in the auditor's office of such county, on or before the 1st day of November, 1885, for the sum of \$13,616 ; that the engineer, Carter, with the approval of such board, agreed to pay defendant Hill for his work in accordance with his bid at the end of each thirty days, upon the estimates of such engineer, eighty-five per cent. of the amount due upon such work, and upon the full compliance with said contract and completion of such work to the acceptance of such engineer and county board, engineer Carter, with the approval of such board, was to pay defendant Hill the full amount due him on such work, and Hill and his co-defendants as his sureties entered into the bond filed with the complaint herein.

And defendants further alleged that, within a few days of the execution of such contract and bond, defendant Hill entered upon the construction of such work according to said contract, and prosecuted the same diligently until Sep-

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tember 15th, 1885, and, at that date, had the work under such headway and so far completed that had plaintiff complied with the terms of such contract on its part, defendant Hill would have completed the work according to such contract, and within the time stipulated for its completion; that plaintiff failed to comply with such contract on its part, in the following particulars, namely: (1) That, on June 3d, 1885, defendant Hill was entitled to an estimate of \$500, according to the terms of such contract, and that, instead of giving him an estimate for that sum, engineer Carter in violation of such contract gave him an estimate for \$300; and that, at that time, he was entitled to the payment of \$425, and in violation of said contract such engineer paid him the sum of \$255. (2) That, on July 3d, 1885, he was entitled to an estimate of \$1,850, but such engineer Carter, in violation of such contract, gave him an estimate for \$1,460; and that he was then entitled, by the terms of such contract, to the payment of \$1,572.50, but such engineer, in violation of said contract, paid him the sum of \$1,261. (3) That, on August 3d, 1885, he was entitled to an estimate on his work of \$2,100, but engineer Carter, in violation of the terms of such contract, gave him an estimate of \$1,105; and that he was then entitled, under such contract, to be paid \$1,785, but such engineer Carter, in violation of said contract, paid him the sum of \$1,105. (4) That, on September 3d, 1885, defendant Hill was entitled to an estimate of \$3,000 according to said contract, but engineer Carter, in violation of such contract, gave him an estimate for \$932; and that he was then entitled to be paid on said contract the sum of \$2,550, but such engineer, in violation of said contract, then paid him the sum of \$792.20.

And defendants averred that defendant Hill continued to work upon said road under such contract until the 1st day of November, 1885, employing hands and completing the work as fast as he could with the amount of money that had been furnished by the estimates of such engineer, on which

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last named day plaintiff declared said contract at an end, and notified defendant Hill and his employees accordingly, and ordered them to quit operations on such work under said contract, which was done accordingly by defendant Hill, under protest, as he was unable to further prosecute the work under such contract, on account of the failure as aforesaid of plaintiff and engineer Carter to comply with the terms of such contract on their part; and because of such failure of plaintiff as aforesaid, defendant Hill was unable to complete such contract within the time specified therein. Wherefore defendants demanded judgment.

It was stipulated in the contract or agreement for the construction of the Versailles and Dillsborough Free Gravel Road, executed by and between the engineer, Carter, with the approval of the board of commissioners of Ripley county, and the defendant Hill, as follows:

“The said Carter, by and with the approval of said board of commissioners, agrees to pay the said John F. Hill for his work in accordance with said bid, at the end of each thirty days, upon the estimates of the said engineer, eighty-five per cent. of the amount due upon said work; and upon the full compliance with this contract, and completion of said work to the acceptance of the said engineer and the board of commissioners of said county, the said Carter, with the approval of said board of commissioners, is to pay to the said John F. Hill the full amount due him upon said work, as per this agreement.”

In the second paragraph of defendants' joint answer herein, the substance of which we have given, they have alleged specifically and at length the continuous failure of plaintiff and engineer Carter, “at the end of each thirty days” during the continuance of the contract sued upon, to give defendant Hill full or correct estimates of the amount of work done by him in the preceding thirty days, or to pay him the agreed percentage upon the estimates of such engineer, “of the amount due upon said work,” as a complete defence in

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bar of plaintiff's cause of action, as stated in its complaint herein.

In discussing the alleged insufficiency of the several paragraphs of such complaint, we have already said that it was incumbent upon plaintiff herein, for the purpose of stating a cause of action sufficient to withstand a demurrer, to show by proper averment that it had performed all the stipulations of the contract in suit, on its part to be kept and performed, or such facts as would constitute a valid excuse for its non-performance of such stipulations. While this is so, however, the defendants may, if they choose so to do, plead affirmatively in such an action as the one now before us the substantial non-performance by plaintiff of material stipulations of the contract sued upon, by it to be performed, in bar of its cause of action. This is not controverted by plaintiff's counsel, as we understand their argument; but they first insist that the second paragraph of the joint answer is bad on demurrer, because it pleads conclusions of law, and not facts, as a defence to the action. Counsel say: "We submit that these averments stated conclusions of law. Whether or not Hill was entitled to estimates depended upon other facts; for instance, the amount and character of the work he had done, which should have been stated."

It is a mistake, we think, to say that defendants have pleaded conclusions of law and not facts, in the second paragraph of their joint answer. Whether or not Hill was entitled to estimates, was not a conclusion either of law or fact. It was a fact stated in the contract, that engineer Carter should give Hill estimates of his work at the end of each thirty days, during the continuance of the contract. The estimates of the engineer given to Hill, under the contract, were facts and were properly pleaded as such by defendants, without stating the amount and character of the work done by Hill for which such estimates were given. But plaintiff's counsel further claim that such second paragraph of answer was insufficient on demurrer, because it was stipulated in the

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contract that, in its execution, the engineer's estimates should be "final and conclusive." If defendants had alleged nothing more, in such paragraph of answer, than that defendant Hill was entitled, at the end of each thirty days, to much larger estimates for the amount of work done than the estimates given him by engineer Carter, it would seem to us that this objection of plaintiff's counsel to the sufficiency of such second paragraph was well taken and ought to be sustained. It was not alleged by defendants that such engineer's estimates were less than they ought to have been, through the fraud, incompetency or mistake of the engineer; and, in the absence of such an allegation, it must be held, we think, that, under the contract, such estimates were final and conclusive as against defendants. But however this may be, defendants allege much more in the second paragraph of their answer than that Hill was entitled at the end of each thirty days to much larger estimates than those given him by engineer Carter. For defendants alleged and plaintiff, by its demurrer, admitted that the payments to defendant Hill, for work done by him under such contract, were in the aggregate but little more than one-half of the sum actually due him for his work done. There is no stipulation in the contract sued upon that the engineer's payments to defendant Hill, for his work done, were "final and conclusive" as against him or his sureties in such contract. Our conclusion is, that plaintiff's demurrer to the second paragraph of defendants' joint answer was properly overruled.

Passing over a number of the other errors assigned by plaintiff upon the record of this cause, we come now to the consideration of the errors predicated by plaintiff upon the overruling of its demurrers to the several paragraphs of the separate cross-complaint of defendant John F. Hill. This cross-complaint contained three paragraphs. The first paragraph proceeds upon the theory that plaintiff herein is liable to him for the damages which he claims that he sustained by reason of the alleged failure of engineer Carter to give him

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such estimates from time to time, for the amount of work done by him, as he states that he was entitled to under his contract to construct the free gravel road mentioned in the complaint herein. These matters are stated by defendant Hill, in the first paragraph of his cross-complaint, substantially as the same matters were pleaded by all the defendants in the second paragraph of their joint answer, the substance of which we have heretofore given. Defendant Hill further alleged in the first paragraph of his cross-complaint, that in June, 1885, he and engineer Carter and plaintiff, by verbal contract, modified the aforesaid written contract by changing the line and course of such road (describing such change); that the consideration received by plaintiff for agreeing to such change and modification of the written contract was, that defendant Hill was to purchase, pay for and have conveyed to plaintiff the real estate over which such road was to run on its new line; that defendant purchased such real estate and paid therefor \$150, and had it conveyed to plaintiff; that the engineer established the grade of such new line, and superintended defendant's work generally in the construction thereof; that defendant Hill expended in building said road over such new route as changed, with the knowledge, consent and approval of such engineer and the plaintiff, pursuant to the modification of such contract, the sum of \$2,000; that defendant Hill graded the whole line of such road, including such change thereof, built culverts and bridges as provided in such contract, and put the metal on five miles of such road, amounting in all to the sum of \$8,000, and had sustained damages in the sum of \$2,000 in consequence of being deprived of the benefits of the completion of said work, under such contract. Wherefore, etc.

We are of opinion that the court below clearly erred in overruling plaintiff's demurrer to the first paragraph of the cross-complaint of defendant John F. Hill. It is manifest, from the entire record of this suit, that the contract and bond declared upon by plaintiff were executed under and pursuant

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to the laws of this State, which took effect and became in force (1) on March 3d, 1877, and (2) on July 18th, 1885. These two laws, though differing in some particulars, concur in vesting in the political and governmental entity, known as the board of commissioners of each county in the State, with certain well defined and strictly limited functions, powers and duties, administrative and judicial, in connection with the construction of free gravel roads within the territorial limits of such county. These two laws also concur in providing, clearly and unequivocally, that the corporate county shall not be subjected to nor incur any debt, liability or damages by reason or on account of the construction of any such road, or by reason of any act done, or for any failure or omission to act, by the county board, or by the engineer or superintendent in charge of the construction of such road. This conclusion follows of necessity from, and is supported by, several recent decisions of this court, in cases involving the construction of the aforesaid laws for the construction of free gravel roads, and the liability of the corporate county for debts or damages growing out of, or resulting from, acts of commission or omission by the county board, or by the engineer or superintendent, in the construction of such roads. *Strieb v. Cox*, 111 Ind. 299; *Board, etc., v. Fullen*, 111 Ind. 410; *Burton v. State, ex rel.*, 111 Ind. 600; *Abbett v. Board, etc.*, 114 Ind. 61.

It follows, therefore, that the first paragraph of defendant Hill's cross-complaint, the substance of which we have given, proceeds upon a wrong theory, and states facts, which are not sufficient to show that he had, or could have, any valid and subsisting claim or demand against the plaintiff herein.

Without setting out the substance even of the second and third paragraphs of such cross-complaint, we may say generally that they each proceed upon the same theory, and are open to the same objections, as the first paragraph of such cross-complaint.

Troyer v. The State, *ex rel.* Nichols.

Plaintiff's demurrers to each paragraph of Hill's cross-complaint were well taken, and ought to have been sustained.

The judgment is reversed, with costs, and the cause is remanded for further proceedings in accordance with this opinion.

Filed March 22, 1888; petition for a rehearing overruled June 28, 1888.

No. 13,320.

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115	331
127	497
115	331
137	353

ARGUMENT OF COUNSEL.—*Misconduct. — Reversal of Judgment.*—A statement by counsel for the plaintiff, in his closing address, in effect telling the jury that the attorney for the defendant is occupying a position inconsistent with that previously contended for by him on the trial of a similar case, and which is also calculated to remind a juror in the case on trial, who was likewise a juror in the previous case referred to, that his own consistency might be involved in the verdict to be returned in the case under consideration, is such misconduct as will require the reversal of the judgment, unless the offending party shows affirmatively either that the matter was set right by the court or that it was harmless.

From the Howard Circuit Court.

J. C. Blacklidge, W. E. Blacklidge, M. Bell, W. C. Purdum and *B. C. H. Moon*, for appellant.

J. M. Fippen, B. F. Harness and *D. A. Woods*, for appellee.

MITCHELL, J.—The relatrix complained of Joseph E. Troyer, and charged that she had been delivered of a bastard child on the 3d day of September, 1885, of which the defendant was the putative father.

The trial in the circuit court resulted in a finding and judgment against the appellant.

Troyer v. The State, *ex rel.* Nichols.

The relatrix testified at the trial that the appellant was the father of the child of which she had been delivered, and that she was a domestic, residing in his family at the time it was begotten.

She testified further that illicit relations existed between herself and the appellant during a considerable portion of the time she resided in his family, and that the appellant was in the habit of leaving the bed and room in which he and his wife slept, and of coming to her bed in a room near by.

The appellant persistently and emphatically denied having had any improper relations with the relatrix at any time or place. It appeared that there were but four apartments, and those on the same floor, in the house temporarily occupied by the appellant and his family and hired help.

The defence insisted that illicit intercourse could not have been had and carried on by the appellant with the relatrix in the manner and under the circumstances detailed by her, without detection owing to the proximity of the appellant's wife and other members of the family. There was reasonable ground to suspect the truth of the relatrix's story. A bill of exceptions recites that the plaintiff's counsel, during his closing argument to the jury, used the following language:

"I well recollect how Mr. Bell told a jury of Howard county, when he was attorney for the plaintiff, how Joshua Freeman got up out of his bed and slipped into the room of Mary Sleeth." This statement was objected to, but the court seems not to have given the objection any attention.

The bill of exceptions shows further, that another bastardy suit had been tried at the same term of court, in which Mary Sleeth appeared as the relatrix, and Joshua Freeman as defendant, and that a Mr. Lindley, one of the jurors in the case on trial, was also a juror in the case referred to, and that the Mr. Bell referred to by counsel was the attorney for the relatrix in the former case, and was one of the defendant's attorneys in the present case. It also appeared that counsel made the statement above set out in illustration of

Troyer v. The State, *ex rel.* Nichols.

how the defendant, in the case on trial, went from the room occupied by him to that of the relatrix.

The reference made by plaintiff's counsel to the line of argument pursued by counsel for the defendant in a similar case previously tried, was certainly improper, and while under ordinary circumstances it might have been harmless, it was liable to be injurious under the circumstances disclosed in the present case. It was, in effect, saying to the jury that counsel for the defence, in the case on trial, was occupying a position inconsistent with that contended for by him on the trial of a previous case. The worst feature of the statement, however, was, that it was well calculated to remind juror Lindley of the result arrived at in the case referred to, and to impress upon him that his own consistency might be involved in the verdict to be returned, or conclusion to be arrived at, in the case then under consideration. Lindley, as well as the other jurors, should have been left free to decide the case in hearing without any reference to the evidence or argument in another similar case. The case was close and doubtful on the evidence as it stood. The improper statement of counsel, made seemingly with the approbation of the court, may have turned the scale.

When counsel abandon the evidence and the wide range of argument and illustration which it affords, and seek by a side wind to bridge over or supply what may seem a close point, by bringing forward matter not in evidence, and commenting upon it, they take the hazard of showing that such conduct was fully set right by the court, or that it was harmless. *Nelson v. Welch, ante*, p. 270.

That has not been done in the present case—rather the bill of exceptions discloses other violations of the rules of debate, which need not be referred to, which should have received the attention of the court.

The judgment is reversed, with costs.

Filed June 22, 1888.

No. 13,394.

LOWER v. FRANKS ET AL.

MALPRACTICE.—Contributory Negligence.—Contributory negligence is admissible as a defence to an action against a surgeon for malpractice.

JUDGMENT.—Against Part of Defendants.—Joint and Several Liability.—Pleading.—Under section 570, R. S. 1881, every complaint against two or more defendants, whether founded upon contract or tort, will be treated as both joint and several, and, although the complaint may allege a joint liability, the plaintiff will be entitled to judgment against part of the defendants if he proves a cause of action against them and not against all.

INSTRUCTIONS TO JURY.—Making Part of Record.—Where the transcript on appeal contains a complete series of instructions, at an appropriate place, consecutively numbered, signed by the judge, filed, and with a proper caption, on the margin of each of which there is a memorandum that it was given and excepted to, also signed by the judge, such instructions are, under section 535, R. S. 1881, properly in the record without a bill of exceptions or order of court, and the presumption is that they were all the instructions given by the court.

SAME.—Erroneous.—Withdrawal.—The giving of a fatally erroneous instruction can only be cured by a plain withdrawal of the instruction. A withdrawal will not be presumed, but must be affirmatively shown.

From the Noble Circuit Court.

J. Morris, C. H. Aldrich, J. M. Barrett and I. Stratton,
for appellant.

H. G. Zimmerman and R. P. Barr, for appellees.

NIBLACK, J.—William D. Lower brought this action against William H. Franks and George W. Carr, both practicing physicians and surgeons, for alleged malpractice in treating his broken leg.

The defendants answered: *First.* In denial. *Secondly.* That the plaintiff's neglect and refusal to obey the instructions given him by the defendants, and to observe and follow the treatment prescribed by them, contributed to and caused the suffering and damages complained of.

A demurrer being first overruled to the second paragraph

115 334
138 19

115 334
142 487
143 703

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151 395
151 496

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164 478

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of the answer, issue was joined upon it. Verdict and judgment for the defendants.

The first assignment of error we deem it necessary to notice, is made upon the overruling of the demurrer to the second paragraph of the answer. In argument it is claimed that contributory negligence is not admissible as a defence in actions of the class to which this belongs, which are, in legal effect, based upon a contract entered into by the surgeon when he undertook to treat the plaintiff for the wound or injury from which the latter was suffering.

An action against a railroad company for a negligent injury to a passenger while under its charge, is, though sounding in tort, really an action founded upon, and arising out of, a contract. Yet, in that class of actions, proof of contributory negligence is fatal to a recovery. So important is it considered in this State that contributory negligence shall not appear as an element in actions of that class, that the plaintiff is required to aver in his complaint, and to show at the trial, that he did not contribute to the injury complained of. In pleading, therefore, contributory negligence is not, in this State, generally treated as a matter of defence, technically speaking, but as a thing to be negatived, both in the complaint and by the evidence, as a pre-requisite to the right to recover for the negligence of the defendant. *Louisville, etc., R. R. Co. v. Orr*, 84 Ind. 50; *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31.

While there may be some exceptions to the rule, it may be said generally that there can be no recovery in an action sounding in tort, yet founded on contract, where the injury sued for was caused by the mutual neglect of the opposing parties. The reasons which support this rule are stated with great force and perspicuity in the case of *Railroad Co. v. Aspell*, 23 Pa. St. 147, and the doctrine of that case is fully approved in *Beach on Contributory Negligence*, see pages 14, 15 and 37.

In legal parlance, contributory negligence is usually referred

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to in this and other jurisdictions as a defence to an action for negligence, and, in many of the States, perhaps—in at least some of them—it is treated only as a defence to such an action. Such negligence has been fully recognized in several well considered cases, as well as upon general principles, as a defence to an action against a physician or surgeon for malpractice. 4 Wait Actions and Defences, 681, 682; 6 Wait Actions and Defences, 597, 598, and authorities cited.

In the case of *Coon v. Vaughn*, 64 Ind. 89, it was held that, owing to some exceptional peculiarities of an action for malpractice, it was not necessary, under our system of practice, to aver the absence of contributory negligence in the complaint. As at present advised we do not feel called upon to overrule that case. It follows that such negligence ought to be admitted in this State, as it has been elsewhere, as a defence to an action for malpractice, and that the demurrer to the paragraph of answer in question was rightly overruled.

At the trial the court gave to the jury what appears to have been a carefully, and, for the greater part, well prepared series of instructions. The eleventh of the series was as follows:

“The complaint charges that the defendants jointly undertook to treat the plaintiff's limb. Under the complaint it must be shown, by a preponderance of the evidence, that the undertaking or contract was made jointly with both the defendants for treating the limb. Such a contract may be implied from the conversations and conduct of the parties and circumstances of the case, as well as by an express agreement. And if you should find from the evidence that the defendants jointly undertook to treat the limb, each would be responsible for the acts of the other in treating the limb, and you would be warranted in finding against both the defendants if the evidence shows that any injury or damage resulted from the want of care or skill of either or both defendants. On the other hand, if you should find that, by an

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express agreement; or from the conversations and conduct of the parties, and the circumstances of the case, as shown by the evidence, that the undertaking was separate on the part of each defendant, then each would only be responsible for his own acts in treating said limb, and not answerable for the acts of the other. And, in such case, you can not find for the plaintiff, although both the defendants, or either one of them, may have been guilty of not using proper care and skill in treating the limb."

Acting upon the doctrine of this instruction, the court refused to submit to the jury a form of a verdict against one of the defendants and in favor of the other.

It is further claimed that the instruction thus set out is in palpable conflict with section 366 of the civil code of 1852, and continued in force by section 570, R. S. 1881, and with the cases resting upon it. That section is as follows:

"Though all the defendants have been summoned, judgment may be rendered against any of them, severally, when the plaintiff would be entitled to judgments against such defendants if the action had been against them severally."

Under the construction heretofore given by this court to that section of our code, the instruction can not be sustained. *Draper v. Vanhorn*, 12 Ind. 352; *Hubble v. Woolf*, 15 Ind. 204; *Fitzgerald v. Genter*, 26 Ind. 238; *Carmien v. Whitaker*, 36 Ind. 509; *Murray v. Ebright*, 50 Ind. 362; *Stafford v. Nutt*, 51 Ind. 535; *Richardson v. Jones*, 58 Ind. 240.

In the case of *Hubble v. Woolf*, *supra*, following the case of *Blodget v. Morris*, 14 N. Y. 482, it was held, in terms, that this provision of the code applies to all actions indiscriminately, whether founded upon contract or upon tort; that it is immaterial whether the complaint alleges a joint or a joint and several liability; that the right of recovery is, in this respect, to be regulated by the proof, and not by the allegations of the complaint; that, in other words, every complaint is, in the respect stated, to be treated as both joint

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and several where there are two or more defendants; that the object of the provision obviously is to prevent a plaintiff who proves a good cause of action against part of the defendants, but not against all, from being put to the expense and delay of a new action; that the provision simply applies to actions upon contracts the same rules which, at common law, governed actions for torts. This has ever since been accepted as the proper construction of the provision in question, and is, we have no doubt, a construction which ought to be adhered to.

There was evidence to which the instruction under consideration had a material application, and as it is in direct antagonism to the doctrine of the cases cited, the judgment ought to be reversed.

The judgment is reversed, with costs, and the cause remanded for a new trial.

Filed Jan. 17, 1888.

ON PETITION FOR A REHEARING.

NIBLACK, C. J.—The appellees in their original brief made the point that the instructions copied into the transcript, and purporting to have been given at the trial, had not been properly made a part of the record, and that, consequently, this appeal presented no question upon any of those instructions. Without making a distinct ruling upon the point thus made, we considered the instructions at the hearing, and, as has been seen, set out, and passed judgment upon one of them upon the assumption that it had been made and was a part of the record.

The further point was made that there was nothing connected with the instructions, as they are copied into the transcript, from which we could infer that they were the only instructions given by the court at the trial, and that hence it does not affirmatively appear that no other instruction was given either modifying, or, in effect, withdrawing the eleventh instruction, which we have held to be erroneous.

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By a petition for a rehearing the points thus originally made are renewed, and we now proceed to consider them.

This cause was known as No. 624 in the court below. In noting the proceedings at the trial, the instructions referred to are copied into the transcript at the appropriate place and are made to appear as having been given on the 16th day of April, 1884, the day on which the argument was concluded and the jury retired to consider of their verdict. The instructions are in the form of a series, and have a caption giving the name of the State, the name and term of the court, and the title of the cause, with a heading entitled "Instructions by the court." This is followed by seventeen consecutively numbered instructions, signed, at the close of the last one, by the judge who tried the cause. On the margin of each instruction is written the words "Given and excepted to by defendants, April 16th, 1884," which was also signed by the judge. These instructions are endorsed "No. 624. Instructions. Filed April 16th, 1884. Merritt C. Skinner, clerk." These memorandums, signatures and endorsements brought the instructions into the record, under the provisions of section 535, R. S. 1881, without a formal bill of exceptions, and without any order of court making them a part of it. *Childress v. Callender*, 108 Ind. 394; *Fort Wayne, etc., R. W. Co. v. Beyerle*, 110 Ind. 100.

Furthermore, in the absence of anything in the record indicating the contrary, the inference ought to be that the instructions given in the form of a series, as above, were all the instructions given by the court, and that they constituted the general instructions of the court required to be given by section 533, R. S. 1881. The inference ought also to be that the instructions were in writing, although it was not essential that they should have been so when given, unless required to be by one of the parties.

It is true, as claimed, that this court has frequently held, that where the court below has refused to give an instruction which stated the law correctly and was applicable to the

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facts of the case, but where the record disclosed nothing as to whether any instructions were given, we will presume that the court below did its duty, and gave general instructions covering all the matters in controversy, and will not reverse the judgment upon the ground that the instruction may have been refused because the subject-matter of it had already been given to the jury.

That rule of practice has, however, no application to the case before us, where a series of general instructions was given, and one of the series is adjudged to be erroneous. The giving of a fatally erroneous instruction can only be cured by a plain withdrawal of the instruction, and the withdrawal of such an instruction will not be presumed, but must be affirmatively shown. *Kingen v. State*, 45 Ind. 518; *Toledo, etc., R. W. Co. v. Shuckman*, 50 Ind. 42; *Binns v. State*, 66 Ind. 428.

It is still further insisted that the verdict was so clearly right upon the evidence that it ought not to be disturbed notwithstanding the erroneous instruction set out in the opinion. While much of the evidence was entirely favorable to the appellees, there was a sharp conflict in the evidence in other respects, and hence the case presented was one in which the jury should have been very carefully and correctly instructed.

We have made some verbal corrections and changes in that part of the opinion which treats of the question of contributory negligence, not affecting any of the conclusions originally announced, and with the opinion as it now stands we are content.

The petition for a rehearing is, therefore, overruled.

Filed July 10, 1888.

Hirsch v. Norton, Administrator.

No. 13,105.

HIRSCH v. NORTON, ADMINISTRATOR.

CORPORATE STOCK.—Assignment.—Secret Agreement that Title Shall Remain in Assignor.—Rights of Assignee's Creditors.—Estoppel.—H. transferred, on the books of the corporation, bank stock to S., and certificates were issued to the latter. At the same time the parties entered into a secret agreement, stipulating that the transfer was made without consideration, and that H. should remain the owner of the stock. S. died insolvent, with the certificates in his possession.

Held, that H. can not assert his title as against creditors of S. whose claims were contracted on the faith that the latter owned the stock.

SAME.—Decedent's Estate.—Creditors.—Administrator.—In such case the administrator of the decedent, as the representative of the creditors, may show when their claims accrued, and that credit was given on the faith that S. was the owner of the stock.

From the Randolph Circuit Court.

E. L. Watson and J. S. Engle, for appellant.

W. A. Thompson, A. O. Marsh and J. W. Thompson, for appellee.

ELLIOTT, J.—In his complaint the appellant alleges that he is the owner of ten shares of the capital stock of the Randolph County Bank; that he transferred the stock on the books of the bank to Levi W. Study; that the bank issued to Study the proper certificate; that, at the time the transfer was made, a written contract was entered into between the appellant and Study, wherein it was stipulated that the former should remain the owner of the stock, and receive all dividends, and that the transfer was made without consideration.

It is further alleged that Study did not own or control the stock; that he died intestate on the 11th day of December, 1885; that he was, at the time of his death, in possession of the certificate issued to him; that his estate is insolvent, and that the appellee, Norton, as his administrator, has taken

115	341
136	101
115	341
140	258
142	631
115	341
144	57
115	341
154	270

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possession of the certificate of stock and holds it as part of the assets of his intestate's estate.

The material allegations of the third paragraph of the answer of the appellee, Norton, are these: That the Randolph County Bank was a corporation duly organized under the laws of this State; that the capital stock of the bank was divided into shares of one hundred dollars each; that the appellant owned one hundred and ten shares of the capital stock; that he transferred to Study ten shares, and caused a formal transfer to be made on the books of the bank; that the bank issued a certificate for ten shares of stock to Study; that the stock remained in Study's name at the time of his death and still so remains; that the certificate was in his possession when he died; that Study and the appellant executed the written contract set out in the complaint; that the execution and existence of this writing were kept a secret and were concealed until after Study's death; that, from the time of the transfer until Study died, the appellant held him out to the stockholders of the bank and to the public generally as the owner of the stock; that he drew dividends and paid taxes on it; that, at the date of his death, he was insolvent; that each and all of the creditors of his estate contracted with him with the full knowledge that the stock stood in his name on the books of the bank and in the full faith and belief that it was his absolutely, and that they gave him credit in the faith and belief that he owned the stock.

The ten shares of stock were transferred to Study in full form, and he was invested with all the evidences of title that his assignor could clothe him with. In appearance he was the sole and legal owner of the stock. The books of the bank showed this ownership, and he was the holder of the certificate, which was the highest and best evidence of ownership. Nothing was lacking in his evidence of title. As against those with whom he dealt and who gave him credit on the faith that he owned the stock, he is in equity to be deemed the owner. *Wheelock v. Kost*, 77 Ill. 296; *Adderly*

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v. *Storm*, 6 Hill, 624; *Hale v. Walker*, 31 Iowa, 344; *Leitch v. Wells*, 48 N. Y. 585; *Kelly v. Scott*, 49 N. Y. 595; *Moore v. Metropolitan Nat'l Bank*, 55 N. Y. 41; *McNeil v. Tenth Nat'l Bank*, 46 N. Y. 325; *Hilliard v. Cagle*, 46 Miss. 309, 336.

The property transferred by the appellant to Study is of a peculiar nature, and is assignable in a peculiar method. The cases which govern transfers of tangible personal property can not control where the subject of the transfer is the capital stock of a corporation. In making transfers of corporate stock, the full, absolute legal title is transferred in cases where all is done that the law requires. *State, ex rel., v. First Nat'l Bank*, 89 Ind. 302; *Brewster v. Hartley*, 37 Cal. 15; *Fisher v. Seligman*, 75 Mo. 13.

The transfer made by the appellant gave to Study all the evidence of title that it was possible for the one to create or the other to acquire, and as to those who in good faith gave Study credit on the faith of his legal ownership, the appellant can not be allowed to make available the secret agreement between him and his assignee. He voluntarily put it in the power of Study to secure credit upon the faith of his ownership of the stock, and as against creditors he can not be heard to aver that the secret agreement secured to him the ownership of the capital stock. Where a party, by clothing another with all the legal *indicia* of ownership, enables him to mislead others, he, and not those who are misled by his acts, must be the sufferer. If loss comes, the man who invested the debtor with the evidence of absolute title, and thus misled creditors, must bear it, and not the creditors. The conclusion we assert involves little more than an application of the familiar general principle, that where one of two innocent persons must suffer by the act of a third, he must suffer who put it in the power of the third, to do the act. *Quick v. Milligan*, 108 Ind. 419; *Preston v. Wither-spoon*, 109 Ind. 457; *Kelley v. Fisk*, 110 Ind. 552; *Cowdrey v. Vandenburg*, 101 U. S. 572; *Wood's Appeal*, 92 Pa. St.

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379 (37 Am. R. 694); *Hamlin v. Sears*, 82 N. Y. 327; *Crocker v. Crocker*, 31 N. Y. 507.

The assignment and transfer of the certificate, considered without reference to the secret agreement, undoubtedly vested title in Study, and if that title is defeasible it must be because of the agreement between him and the appellant.

We have already given sufficient reasons for our conclusion that the secret agreement can not prevail as against creditors, but we may add another, and that is that the agreement creates a secret trust void as against creditors under the provisions of our statute. R. S. 1881, section 4921; *Plunkett v. Plunkett*, 114 Ind. 484; *Mayer v. Feig*, 114 Ind. 577.

The case of *McGirr v. Sell*, 60 Ind. 249, and cases of a similar class, can not, as we have already suggested, rule here, for here there was much more than a mere delivery of the possession of property; there was an actual transfer evidenced in such a method as to invest the assignee with all the possible *indicia* of ownership. In the cases referred to by appellant's counsel there was no written evidence of title, and for that reason those cases are to be discriminated from the present. But, as we have already indicated, that is not the only reason for discriminating between the two classes of cases.

It was proper to prove the claims of creditors, and to prove when they were created. The reason for this conclusion is, that the administrator represents the creditors, and as their representative he had a right to show when their claims accrued, and to show, also, that credit was given the intestate on the faith that he owned the stock transferred to him by Hirsch. The case is strictly analogous to that of a fraudulent conveyance, and in such cases it is well settled that the creditors or their representative may show when the debt was contracted. *Stout v. Stout*, 77 Ind. 537; *Second Nat'l Bank v. Townsend*, 114 Ind. 534.

The declarations of Study were competent. They were

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competent upon two grounds: to prove the indebtedness, and to prove that credit was given him on the faith of his ownership of the stock.

Judgment affirmed.

Filed June 26, 1888.

No. 13,070.

SYFERS ET AL. v. BRADLEY ET AL.

CHATTEL MORTGAGE.—*Sale.*—*Purchase by Mortgagee.*—*Execution.*—*Instructions not to Levy.*—*Suspension of Lien.*—*Damages.*—Where the mortgagee of chattels has become the purchaser thereof at a public sale duly made under a power contained in the mortgage, the levy afterwards of an execution in favor of judgment creditors of the mortgagor, the lien of which had been theretofore suspended by a direction to the officer not to levy, is without effect, and the mortgagee may recover from such creditors and officer damages sustained by him by the taking and withholding possession of the property.

SAME.—*Acknowledgment.*—*Recording.*—An averment that a chattel mortgage was recorded in the proper recorder's office carries with it the implication that it had been properly acknowledged and otherwise prepared for record.

From the Hancock Circuit Court.

J. A. New and *J. W. Jones*, for appellants.

W. R. Hough, *C. G. Offutt* and *R. A. Black*, for appellees.

NIBLACK, J.—The complaint of Rufus K. Syfers and Frank McBride, partners, doing business under the firm name of Syfers, McBride & Co., stated that, on the 19th day of December, 1884, Sidney L. Walker and Ward Walker were engaged in the grocery business, as partners, in the city of Greenfield, in this State, in the name and style of Walker

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Brothers; that said Walker Brothers had become and were indebted to the plaintiffs in the sum of \$787; that Walker Brothers thereupon, on the day named, executed to the plaintiffs their promissory note for that sum of money, payable one day after date, with eight per cent. interest and attorney's fees; that to secure the payment of this note, Walker Brothers, at the same time, also executed to the plaintiffs a chattel mortgage on their stock of groceries, including fixtures and other personal property used in the same building; that, by the terms of such chattel mortgage, it was expressly provided that Walker Brothers should remain in possession of the mortgaged property on condition that they would faithfully apply the proceeds of all sales made by them to the payment of the mortgage debt, and that, upon their failure to so apply such proceeds, the plaintiffs might take immediate possession of the property; also, on the further condition that, if the plaintiffs should, at any time, feel themselves to be otherwise insecure, they might require possession to be surrendered to them; that the plaintiffs in due time caused said mortgage to be recorded in the recorder's office of Hancock county, the county in which Walker Brothers resided, and in which the mortgaged property was situate; that Walker Brothers having failed to apply the proceeds of sales made by them to the payment of the mortgage debt, the plaintiffs demanded and, on the 24th day of December, 1884, received and took possession of the mortgaged property; that, by the further terms of said mortgage, the plaintiffs were, in the event of their taking possession, authorized to sell the mortgaged property to pay the mortgage debt, either at public or private sale, as to them might seem best; that, having determined to sell said property at public sale, on the 7th day of January, 1885, the plaintiffs, more than ten days before that day, caused written notices of the proposed sale to be posted up in three public places in the township in which such property was situate, fixing 10 o'clock A. M. as the time at which the sale was to commence; that the

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plaintiffs accordingly exposed the mortgaged property to public sale on said 7th day of January, 1885, and bid therefor the sum of \$700; that, no one bidding more, said property was openly struck off and sold to the plaintiffs for that sum, which was immediately credited on the note which the mortgage was given to secure; that the day before the property was sold as stated, Nelson Bradley and John H. Binford severally procured Walker Brothers to go before a justice of the peace of Hancock county, and to confess judgments in their favor respectively, the one in favor of Bradley being for about \$180, and the other in favor of Binford being for about \$215; that, immediately after the rendition of said judgments, Bradley and Binford caused executions to be issued thereon respectively, and to be placed in the hands of Lafayette Slifer, a constable of said county of Hancock, instructing him at the same time not to levy such executions on the mortgaged property until the next day, which was the day on which it was advertised for sale as stated; that, on said 7th day of January, 1885, about twenty minutes before the time fixed for the sale of the mortgaged property, Bradley and Binford ordered Slifer to enter the building in which such property was situate, and to levy upon all the mortgaged property; that Slifer did enter the building, as he was so ordered, and sought to stop the public sale of said property, making frequent efforts to interrupt such sale, but did not levy the executions in his hands by taking possession of the property, and did not so take possession until after the property was struck off and sold to the plaintiffs; that Bradley and Binford were both present when the property was bid off by, and sold to, the plaintiffs, and refused to bid more than the amount for which the property was sold, but that they, and the said Slifer, did all they could to prevent others from bidding at such sale; that after the plaintiffs had purchased the mortgaged property, they requested all persons present to leave the building that it might be temporarily closed; that all left the building as requested, except Brad-

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ley, Binford and Slifer, who refused to go out; that, thereafter, Slifer, acting under the order of Bradley and Binford, proceeded to eject the plaintiffs from the building and to take possession of it in virtue of the executions in his hands against the property of Walker Brothers; that the plaintiffs yielded the possession of the building under protest, claiming to be the sole owners of the mortgaged property contained within it, and that hence such property was not subject to the executions in Slifer's hands; that the property was still detained from the plaintiffs and was of the value of \$1,200; that the plaintiffs had, by reason of the premises, sustained damages in the sum of \$1,500. Wherefore they demanded judgment against Bradley, Binford and Slifer.

A demurrer was sustained to the complaint, and the defendants had final judgment upon demurrer. The record, therefore, presents only the question of the sufficiency of the complaint.

Section 722, R. S. 1881, provides that "Goods and chattels pledged, assigned, or mortgaged as security for any debt or contract, may be levied upon, and sold on execution against the person making the pledge, assignment, or mortgage, subject thereto, and the purchaser shall be entitled to the possession, upon complying with the conditions of the pledge, assignment, or mortgage."

In the construction of this section this court has frequently held that the officer making a levy on the mortgagor's interest or equity of redemption in mortgaged personal property, is entitled to possession of the property for the purpose of making sale of such interest or equity of redemption, as against the mortgagee, as well as the mortgagor. *Sparks v. Compton*, 70 Ind. 393; *Hackleman v. Goodman*, 75 Ind. 202; *Louthain v. Miller*, 85 Ind. 161; *Slifer v. State, ex rel.*, 114 Ind. 291.

Adhering, as we do, to that construction of the section, it is nevertheless true that the officer making the levy must exercise due care for the protection of the mortgagee's interest

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in the property, and is not permitted to do anything which has the effect of diminishing the value of the property as a security for the mortgage debt. In that view, the property can not be sold in parcels, but when consisting of separate articles it must be sold together, subject to the mortgage. Neither can such officer rightfully do anything to interfere with the sale of the mortgaged property where the mortgagee is empowered to sell it. *Worthington v. Hanna*, 23 Mich. 530; *Cary v. Hewitt*, 26 Mich. 228; *Haynes v. Leppig*, 40 Mich. 602; *King v. Hubbell*, 42 Mich. 597.

The delivery of an execution to an officer, with directions not to levy it, is practically equivalent to no delivery, and hence creates no lien on the personal property of the execution defendant. A direction, therefore, not to levy for a specified time suspends the lien during that time. *Freeman Executions*, section 206; *Moore v. Fitz*, 15 Ind. 43; *Alabama G. L. Ins. Co. v. McCreary*, 65 Ala. 127; *Hickman v. Caldwell*, 4 Rawle, 376 (27 Am. Dec. 274); *Speelman v. Chaffee*, 5 Col. 247.

A mortgagee of personal property may, in this State, become the purchaser of such property at a public sale, and, when the property is struck off and sold to him, he is entitled to be considered and treated as its owner so long as the sale is permitted to stand. *Emmons v. Hawn*, 75 Ind. 356; *Lee v. Fox*, 113 Ind. 98.

From the averments of the complaint in this case we infer that the executions in the hands of Slifer created no lien on the mortgaged property prior to its sale by the mortgagees, and that no levy was in fact made until after the sale and until the mortgagees had become the absolute owners of the property, which was too late to be effective. It follows that the possession of the property taken by Bradley, Binford and Slifer after the sale was in derogation of the rights of Syfers and McBride, and consequently wrongful. The demurrer to the complaint ought, therefore, to have been overruled.

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The judgment is reversed, with costs, and the cause remanded for further proceedings.

Filed April 24, 1888.

ON PETITION FOR A REHEARING.

NIBLACK, C. J.—As has been seen, the complaint alleged that Walker Brothers executed to the plaintiffs a chattel mortgage on their stock of groceries and other personal property to secure the debt therein described; that it also alleged that the plaintiffs in due time caused the mortgage to be recorded in the recorder's office of Hancock county, the county in which Walker Brothers resided, and in which the mortgaged property was situate.

The point was made at the hearing that the complaint was fatally defective in its failure to aver that the mortgage was properly acknowledged before it was recorded; but, regarding the point as wholly immaterial to the merits of the appeal, we did not make any distinct ruling upon it. In their petition for a rehearing the appellees have renewed the point with much earnestness and apparent confidence, and insist that we shall now consider it.

The presumptions are all in favor of a public officer having done his duty in every matter concerning which he has taken official action.

The allegation that the mortgage was recorded in the proper recorder's office, consequently carried with it the implication that the mortgage had been duly prepared for record before it was recorded. In legal contemplation, the entry of an unacknowledged deed or mortgage on the recorder's books does not constitute a recording of the instrument. *Taylor v. City of Fort Wayne*, 47 Ind. 274; *Westerman v. Foster*, 57 Ind. 408; *Carver v. Carver*, 97 Ind. 497.

The acknowledgment of a deed or mortgage has reference only to the proof of its execution and to its preparation for record, and forms no part of the instrument itself. *Gray v. Ulrich*, 8 Kans. 112.

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If the mortgage in question was not acknowledged before it was recorded, the objection can be made, and will regularly arise upon the evidence at the trial. If an acknowledgment can not be shown the record will be of no avail.

Other questions are re-argued, but they have already received sufficient consideration.

The petition for a rehearing is overruled.

Filed June 27, 1888.

115	351
123	261
115	351
126	475
115	351
130	147

No. 13,160.

DUFFY ET AL. v. THE STATE, EX REL. ROGERS, ADMINISTRATOR.

DECEDENTS' ESTATES.—Administrator.—Conversion.—Fraudulent Conveyance.—Setting Aside.—Judgment.—Principal and Surety.—An administrator *de bonis non*, who has obtained a judgment against his insolvent predecessor and his sureties for the conversion by the former of the assets of the estate, may, without proceeding to collect such judgment from the sureties, and without alleging that there are unpaid claims against the estate, maintain an action to set aside a conveyance, which the defaulting administrator had fraudulently made to his children, of land purchased by him with the trust funds, and to subject such land to the satisfaction of the judgment lien.

From the Cass Circuit Court.

D. P. Baldwin, for appellants.

D. D. Dykeman, W. T. Wilson and G. C. Taber, for appellee.

ELLIOTT, J.—It is alleged in the relator's complaint that James Duffy was appointed the administrator of the estate of Michael Carney, deceased; that Duffy received money and

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property of the decedent's estate to the value of \$3,000; that for the money and property so received he has never accounted, but appropriated it to his own use prior to the 1st day of January, 1880; that Duffy invested the amount appropriated by him in the purchase of the real estate described; that he abandoned his trust and fled the State; that he was removed from his trust on the 17th day of September, 1883, and the relator appointed his successor; that, on the 21st day of November, 1883, the relator brought an action on the bond executed by Duffy as administrator, and obtained judgment against him and his sureties, McTaggart and Peirce, for \$1,899 on the 4th day of December, 1884.

It is further alleged that, in October, 1882, James Duffy conveyed the land so bought by him with trust funds to his children, his co-appellants; that, at the time the conveyances were made, he was insolvent, and had no other property than that fraudulently conveyed by him subject to execution; that he had none other at the time this suit was brought; that the grantees paid no consideration for the property conveyed to them; that the conveyances were executed for the fraudulent purpose of cheating and defrauding the creditors of Duffy. The adult appellants did not appear to the complaint, and a default was entered against them.

The administrator *de bonis non* had authority to bring and maintain this suit. The judgment obtained by him against Duffy for a breach of duty was a lien on the land fraudulently conveyed. *Blair v. Smith*, 114 Ind. 114; *Hanna v. Aebker*, 84 Ind. 411.

As the relator had a lien on the property of the fraudulent grantor, he had a right to invoke the aid of a court of equity to perfect that lien and make it available for the purpose of his trust. *Quarl v. Abbett*, 102 Ind. 233 (52 Am. R. 662).

The lien was created by the judgment obtained on the bond, but, in order to remove obstructions to its successful enforcement, the relator was entitled to the assistance of the courts. He might, had he so elected, have sold the land and left it

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for the purchaser to assail the fraudulent conveyances, but this he was not bound to do, for he had a right, in the first instance, to clear away the fraudulent conveyances which clouded his lien. *Brown v. Brown*, 17 Ind. 475; *Johnson v. Harris*, 69 Ind. 305; *Stout v. Stout*, 77 Ind. 537 (541).

The judgment obtained against Duffy and his sureties conclusively adjudged that the amount found due was due the estate of the decedent, and it created a lien for that amount. It also established the further fact that the debt was part of the assets of the estate. As the debt was due the estate, it was not only the relator's right, but it was his duty to take measures to collect it by enforcing the judgment. It is plain, therefore, that he had authority to make clear his way to property subject to his lien by removing the apparent claims of fraudulent grantees. In removing these claims he simply reduced to an available form a claim that had previously been adjudged to be part of the assets of the estate represented by him.

An administrator *de bonis non* must, of necessity, have authority to prosecute all suits essential to perfect the lien of a judgment obtained by him upon the bond of his predecessor. He alone is entitled to collect the judgment and to distribute the proceeds, and, as this is his duty, he must possess the means necessary to enable him to perform it.

The debt for which the judgment was rendered was, it is important to keep in mind, a debt which the administrator *de bonis non* was authorized to collect and distribute as part of the trust estate. It was not a debt due the decedent in his lifetime, but a debt growing out of the default of the first administrator of his estate, and, therefore, one which the successor of the defaulting administrator was bound to collect. The collection of such debts must be made by the administrator *de bonis non*, since he obtains the judgment and is charged with the duty of making it available as part of the trust estate. It is not material, therefore, whether there are

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creditors or not, for, as the debt was due the administrator *de bonis non* in his trust capacity, he was bound to use diligence to secure and distribute the avails of the judgment according to law. It follows, as a necessary logical sequence, that the relator was not bound to aver that there were unpaid debts due from the estate of his decedent. *Langsdale v. Woollen*, 99 Ind. 575.

If he had not obtained the judgment on a claim which accrued subsequent to the death of the intestate, there might possibly be some doubt upon this question; but, however this may be, we think it clear that where, as here, the administrator *de bonis non* obtains a judgment against his predecessor for wrongfully converting the assets of the estate, he may enforce that judgment without alleging that there are unpaid claims against the estate. Either this conclusion must be correct, or it must be true that an administrator *de bonis non* who obtains judgment upon the bond of his predecessor can collect his judgment only in the event that there are no other assets sufficient to pay the claims of creditors. That this last conclusion is correct we venture to assert no one will affirm.

It is, perhaps, true that the relator might, had he so elected, have issued an execution against the sureties and enforced his judgment, but it does not follow from this that the defaulting administrator and his fraudulent grantees have a right to coerce him to pursue that course. The truth of the one proposition does not imply the truth of the other. The relator was, at all events, not bound to pass by property which in equity belonged to the principal debtor, and upon which his judgment was a lien, and compel payment from the sureties on the wrongdoer's bond. There is neither equity nor justice in the demand of the appellants. They occupy a position unfavored by courts of chancery. The property which they seek to wrest from the creditors by fraud is equitably and legally subject to the lien of the relator's judgment, and we can conceive of no reason for permitting them to dictate to him what course he shall pursue. There is no

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merit in their claim that the relator shall leave their wrong undisturbed and compel the sureties to pay the judgment. It is not for them to fraudulently hold the property and demand that the relator shall proceed against the sureties.

Neither in law nor in equity have the appellants a right to demand that the sureties shall be compelled to pay the judgment, and they permitted to hold the property acquired by fraud. The question is not whether the relator might, if he chose, compel the sureties to pay the money, but whether he has a right to make good his lien upon the property of the principal. The lien exists, and we can see no reason why the relator may not make it available, even though it be conceded that he was not bound to do so. The question is, after all, not what he was bound to do, but, what had he a right to do. To us it seems clear that, having a lien, he had a right to make that lien perfect if he so elected, and that he was not bound to pass by the property fraudulently conveyed and seize upon that of the sureties of his predecessor.

The equities of the sureties are infinitely superior to those of the defaulting administrator and his fraudulent grantees, and the administrator was under no obligation to disregard those equities and leave untouched the property upon which his judgment was a lien. Although it may be true that he might have disregarded those equities and coerced payment from the sureties, still he was under no legal or moral obligation to do so, and as he has violated neither a legal nor a moral obligation in endeavoring to perfect his lien upon the property of the principal debtor, there is no impediment in his way to a successful prosecution of this suit. Having a lien upon the property of the principal debtor, he has a right to rely upon that lien and to decline to exact payment from persons whose equities are so great and whose position is so much favored as that of sureties. *Speiglemyer v. Crawford*, 6 Paige, 254.

The rule that the execution creditor may, in the first in-

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stance, levy upon and sell land fraudulently conveyed to satisfy his judgment lien, necessarily implies that he may make that lien available. Suppose that appellee had levied upon the land in the hands of the fraudulent grantees and sold it, could they have defeated a suit by the purchaser at the sheriff's sale to set aside the fraudulent conveyance, upon the ground that the creditor should have issued an execution against the sureties? The question suggests its answer. If they could not defeat a suit by the purchaser, we can see no reason why they can defeat a suit brought for the same purpose by the judgment creditor.

In assuming that the appellee had a plain legal remedy against the debtor, the appellants assume more than is just. There may have been a plain legal remedy against the sureties, but there was none against the principal. In seeking to avoid the fraudulent conveyance the creditor is pursuing a remedy he is entitled to invoke as against him and his fraudulent grantees. As against them there is no plain and adequate legal remedy, for the creditor is invoking the aid of equity to remove a cloud from his legal lien. This he unquestionably has a right to do, for the law affords him no adequate relief. It is, therefore, not just to assume that as against them the creditor has a plain and adequate legal remedy. It is true this assumption is not directly made, but it is the tacit assumption on which the argument is constructed. The truth is that the appellants are contesting the case, not because there is an adequate legal remedy against them, but because there is such a remedy against some other persons, and these other persons the sureties of the principal debtor and fraudulent grantor. When regard is had, as in justice it should be, to the strong equities of the sureties, it can not be justly adjudged that the principal debtor and his fraudulent grantees shall be allowed to hold the land of the principal debtor and compel the creditor to proceed against the sureties.

But is it not assuming too much to assert that the claim

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could, in any event, have been made off the sureties? We can not assume that the administrator has done what he ought not to have done, in a case where the demand comes from a fraudulent grantor and his grantees. It would seem that those parties ought, before they can hold the property acquired by fraud, if they can hold it at all, show that the debt could have been made from the sureties. It is not easy to see upon what equitable or legal grounds they can urge that, in order to protect them in the enjoyment of property fraudulently conveyed, the courts shall presume that the administrator has been guilty of a wrong.

It follows from what we have already said that it was not necessary for the relator to allege that the sureties were insolvent, for, if he had a right to make good his lien against the property of the principal debtor, then it is immaterial whether the sureties were solvent or insolvent. If the relator had a right to make his lien available, without proceeding against the sureties, then it was not incumbent upon him to do more than show that the principal debtor had no property subject to execution other than that fraudulently conveyed when the conveyances were executed and the suit was brought.

It appears on the face of the complaint that Peirce and McTaggart were the sureties on the bond of James Duffy, and this is sufficient to entitle them to protection as sureties under the general rules of the law. The fact that they were sureties, while it may not of itself entitle them to demand as of right the benefit of the statutory provision requiring the creditor to first exhaust the property of the principal debtor subject to execution, does entitle them to the benefit of the legal and equitable rules which govern the relation of principal and surety. The relationship between parties liable upon a bond may be shown, and, when shown, the sureties may assert their rights and equities. *Knopf v. Morel*, 111 Ind. 570; *Montgomery v. Vickery*, 110 Ind. 211; *Scherer v.*

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Schutz, 83 Ind. 343; *Bowser v. Rendell*, 31 Ind. 128; *Harker v. Glidewell*, 23 Ind. 219.

In this instance the relationship does appear from the character of the instrument as well as from the allegations of the complaint, and the appellants are in no situation to complain of the insufficiency of the pleading in this particular. It is, indeed, not easy to perceive how they could successfully complain, even if the averments of the complaint were much more indefinite than they are, since the creditor has so treated them, and the nature of the bond shows that only James Duffy, the defaulting administrator, could have been the principal. The relation of James Duffy so fully appears that his co-judgment defendants Peirce and McTaggart, are entitled to be treated as sureties, with all the general rights and equities of that favored position, and the relator was not in the wrong in so treating them. As they are sureties, the relator is not in the position of one resorting to an extraordinary remedy to make good a lien or a debt where there is a plain legal remedy open to him which he may invoke without doing injustice to the rights of others. It was both equitable and proper for him to elect to seize the property of the principal debtor, bound by the lien of his judgment, rather than to seize the property of the sureties. The fact that there were sureties with superior rights and equities plainly distinguishes this case from those cases which hold that where there is an adequate remedy at law equity will not interfere, and that extraordinary remedies can not be invoked. We do not depart from the doctrine of *Baker v. State, ex rel.*, 109 Ind. 47, but we affirm that it does not apply to a case where, as here, a fraudulent conveyance is sought to be annulled by a creditor who prefers to make his debt out of the property of the principal debtor rather than to exact it from sureties.

It is true, as counsel say, that *prima facie* an administrator has nothing to do with real estate, but this is nothing to the present purpose. The administrator is not seeking to

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obtain real estate; he is seeking to make available a lien created by a judgment in his favor. He is not seeking to subject a decedent's land to sale; he is seeking to clear away a fraudulent conveyance in order to make his judgment lien available. As said in a similar case: "This action was not for the purpose of paying debts against the estate, but for the purpose of collecting a debt coming to the estate." *Langsdale v. Woollen, supra.*

The right to sue on the bond carried with it all incidental rights. The right to obtain a judgment necessarily implies the right to enforce the judgment when obtained. As the relator unquestionably had a right to sue on the bond and obtain judgment, he must, under a plain legal principle, have the incidental rights necessary to enforce that judgment. If the right to bring a suit to set aside a fraudulent conveyance is essential to the enforcement of the judgment, then it exists in the relator, and that it is essential to enforce the judgment the complaint quite clearly shows. The relator is not, therefore, exercising any extraordinary powers, nor is he seeking to obtain land; all that he has done has been done in the exercise of an incidental power involved in his right to obtain and enforce a judgment.

We have fully discussed the questions presented upon the complaint, more fully, perhaps, than, in view of the manner of the attack, the appellants had a right to ask, and we find no substantial defect in it.

We have studied the evidence and we find no reason for reversing the judgment of the trial court.

Judgment affirmed.

Filed June 27, 1888.

The Board of Commissioners of Wells County v. Dailey.

No. 13,293.

**THE BOARD OF COMMISSIONERS OF WELLS COUNTY v.
DAILEY.**

INJUNCTION.—Equitable Jurisdiction.—Taxes.—A court of equity will not enjoin the collection of taxes, claimed to be illegal, until the plaintiff has first paid or tendered the amount of taxes assessed against him, the legality and validity of which he does not call in question in his complaint.

SAME.—Free Gravel Road Tax.—Notice.—Pleading.—Complaint.—In an action to enjoin the collection of a special free gravel road tax, an averment in the complaint that such tax was attempted to be levied on the plaintiff "without notice to him," is not equivalent to an averment that the same was attempted to be levied "without any notice whatever," and is insufficient to charge want of notice.

From the Wells Circuit Court.

J. S. Dailey, L. Mock, A. Simmons, E. R. Wilson and J. J. Todd, for appellant.

HOWK, J.—The first error of which complaint is here made by appellant, defendant below, is the overruling of its demurrer to the second paragraph of plaintiff Dailey's complaint herein.

In the second paragraph of his complaint, plaintiff, Dailey, alleged that he was the owner of certain real estate, particularly described, in Wells county, Indiana; that, on June 9th, 1885, defendant, without notice to plaintiff, and without any authority of law, attempted to levy a special tax of \$8.20 on plaintiff's said real estate for the purpose, as was claimed by the order of said board of commissioners, defendant, of paying interest on bonds issued by said Wells county to aid in the construction of the Bluffton and Salamonina Free Gravel Road, and for the purpose of paying expenses of collecting said tax, and this long after the original assessment for making said gravel road had been placed on the tax duplicate, and long after the completion of said gravel road, and it had been

115	360
131	152
115	360
138	250
115	360
142	93

The Board of Commissioners of Wells County v. Dailey.

received from the contractor; that the tax duplicate for said gravel road tax, and for said additional special tax of \$8.20, was then in the hands of defendant Deam, as treasurer of Wells county, who threatened to levy the same, by distress and sale, unless paid; that said tax, being assessed without authority of law, was illegal and void, but it made a cloud on plaintiff's title to said real estate which he claimed should be lifted. Wherefore, etc.

We are of opinion that the court below clearly erred in overruling defendant's demurrer to the complaint herein, the substance of which we have given almost in the language of the pleader.

Two taxes are described in the complaint, namely: 1. The original gravel road tax; and, 2. The additional special tax, levied long after such original tax, on the 9th day of June, 1885. The original gravel road tax is not shown by any averment in the complaint to have been illegally assessed for any cause or reason. In considering the question of the sufficiency of the complaint herein, it must be assumed as against the plaintiff, therefore, that such original gravel road tax is a tax lawfully assessed by competent authority, upon proper notice and in conformity with law. There is no averment in the complaint that such original gravel road tax has ever been paid, in whole or in part; nor is there any averment therein from which such payment may be fairly inferred. On the contrary, we think it is fairly shown by the averments of the second paragraph of complaint that, at the time of the filing of such paragraph, the original gravel road tax was on the tax duplicate, then in the hands of the treasurer of Wells county, who threatened to collect such tax by distress and sale unless the same were paid. Upon this showing it must be held, in accordance with repeated decisions of this court, that the second paragraph of complaint did not state facts sufficient to entitle plaintiff to an injunction against any of the gravel road taxes described therein, even though it appeared that some part or portion of such taxes was clearly

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illegal. The doctrine of these cases is, that a court of equity will not enjoin the collection of taxes, claimed to be illegal, until the plaintiff has first paid or tendered the amount of taxes assessed against him, the legality and validity of which he does not call in question in his complaint. *City of South Bend v. University, etc.*, 69 Ind. 344, and cases cited; *Mullikin v. Reeves*, 71 Ind. 281; *Mesker v. Koch*, 76 Ind. 68; *Stilz v. City of Indianapolis*, 81 Ind. 582; *Read v. Yeager*, 104 Ind. 195.

With respect to the additional special tax mentioned in the second paragraph of complaint, the only fact averred by plaintiff therein, assailing the legality and validity of such tax, is, that such special tax was attempted to be levied by defendant on plaintiff's land "without notice to him." We say this is the only fact averred, because the remainder of the allegation, "and without any authority of law," is not the averment of a fact, but of the pleader's opinion or conclusion. If it had been averred that such additional special tax was attempted to be levied "without any notice whatever," the averment of the fact would have been the same as that in the complaint in *Board, etc., v. Gruver, ante*, p. 224, which was there held to be sufficient. In the case in hand, the averment of plaintiff is that such special tax was attempted to be levied "without notice to him." Our statute in relation to the levy of taxes or assessments for the construction of free gravel roads (section 5092, R. S. 1881), does not provide for or contemplate personal notice to the owner of the land, but only a "notice by publication," to be given by the proper county auditor. It may well be doubted, therefore, if the second paragraph of complaint sufficiently shows that the statutory notice of the levy of the special tax was not given by the auditor of Wells county. We do not decide this point, as it has not been discussed by counsel; but, as having some bearing on the question, we cite the case of *Baltimore, etc., R. R. Co. v. North*, 103 Ind. 486.

Hammons *et al.* v. Bigelow *et al.*

The demurrer to the second paragraph of complaint ought to have been sustained.

This conclusion renders it unnecessary for us now to consider or decide any question presented by the other errors assigned here by the defendant. Plaintiff's counsel has not favored this court with any brief or argument in support of the rulings of the court below.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrer to the complaint, and for further proceedings.

Filed June 28, 1888.

115	363
125	79

No. 13,082.

HAMMONS ET AL. v. BIGELOW ET AL.

MORTGAGE.—*Foreclosure.*—*Complaint.*—*Personal Liability of Purchaser from Mortgagor.*—A complaint to foreclose a mortgage, which seeks to fix personal liability for the mortgage debt on a purchaser from the mortgagor, by reason of a contract on his part for such payment, must allege that the mortgaged land has been conveyed to such purchaser. An averment that the defendant purchased the mortgaged premises is not sufficient.

SAME.—*Parties.*—*Pleading.*—A suit to foreclose a mortgage can not be maintained against a husband and wife as sole defendants, where the only allegation of title is that "the husband purchased the mortgaged premises."

SAME.—*Parties.*—*Practice.*—The owner of the land is a necessary party to a suit to foreclose, but when the land has been sold and conveyed the mortgagor is not a necessary, though a proper party.

From the Jay Circuit Court.

D. T. Taylor, J. W. Headington, J. J. M. LaFollette, J. F. LaFollette and J. M. Smith, for appellants.

P. A. Randall, W. J. Vesey, T. Bosworth and O. H. Adair, for appellees.

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ELLIOTT, J.—The first paragraph of the appellees' complaint is founded upon a bond and mortgage executed by Jacob Starr and wife to Paul K. Randall, deceased. It is averred that, "after the execution of the mortgage, Robert T. Hammons purchased the mortgaged premises of Starr, and as part of the purchase-money agreed to pay and discharge the mortgage." There is no allegation that the land was conveyed to Hammons, and the appellants vigorously contend that because there is no such allegation the pleading is bad.

In answer to the argument of appellants' counsel, the counsel for appellees say: "The complaint does show, however, that Hammons purchased the land, and as part of the purchase-money assumed the mortgage. We think that the word 'purchase' includes conveyance, as a purchase would be incomplete without a conveyance. But if there was no conveyance, Hammons, as a purchaser, would have such an interest as would make him a proper party to a foreclosure proceeding, if his interest was known to the mortgagee."

Two questions are involved in counsel's position. The first is as to the personal liability of Hammons. It is our judgment that the law is against the appellees on this question. Hammons is only liable upon the ground that his promise constitutes part of the purchase-money of the land, and to give validity to that promise it must be shown that he received the consideration by which it is supported. The theory which sustains the rule (a rule, by the way, not assented to without stubborn protest from some of the authorities) that the grantee is liable upon his parol promise to pay the debt of his grantor, is that the promise is to pay a part of the purchase-money, and is, in effect, a promise to pay the promisor's own debt. This theory it is which enables the courts to avoid the statute of frauds, and it is essential to the existence of the theory that the promisor should obtain the land which constitutes the consideration for his promise. But aside from the principle we have referred to,

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there is an elementary rule which bears strongly against the appellees, and that is the rule that a party who sues on a contract not importing a consideration, must aver the consideration and show that it has been paid or yielded. This rule is very often applied to grantors who sue for unpaid purchase-money, and they are uniformly required to aver either a conveyance or a tender of conveyance. Indeed, the rule is even broader than we have stated it, for in all cases the plaintiff who sues on a contract must show that he has performed his part, or show an excuse for not performing it.

The second question involved in counsel's position is this: Can a suit to foreclose a mortgage be maintained against a husband and wife, sole defendants to the suit, where the only allegation of title is that the husband "purchased the mortgaged premises?" This is the question as the record presents it, although it is not the question which counsel argue. The question is not whether Hammons and his wife would be proper parties to answer as to their interest, in a suit brought against the mortgagor, but whether the suit can be maintained against them as sole defendants. We do not doubt that, if the mortgagor had been a party, Hammons would have been a proper party, but that is not the question here; the question here is, can one who is averred to have "purchased the mortgaged premises," be sued without averring that he received a conveyance or acquired title to the land? In other words, is there any cause of action against him? In our opinion there is not. It is not enough, in such a case as this, to aver that the defendant has purchased the mortgaged premises; it must be shown that he has acquired the mortgagor's title. If this be so, then we should have the strange anomaly of a suit for foreclosure against a sole defendant who has not obtained title to the land. The very purpose of a foreclosure under our law is to obtain a decree for the sale of the land, and it is impossible to conceive how such a decree can be obtained where

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the only defendant before the court has not acquired title. 2 Jones Mortgages, section 1394.

The second paragraph of the complaint contains substantially the same allegations respecting the execution of the bond and mortgage by Starr as the first, but it avers that Starr "sold and conveyed the premises to Robert T. Hammons, who, as part of the purchase-price thereof, assumed to pay the mortgage and bonds." This averment removes the objection which we have held fatal to the first paragraph, but there are other objections to the second paragraph which require examination.

It is therein averred that after the maturity of the mortgage notes the plaintiffs, at the request of Hammons, sent the bond and mortgage to the Citizens' Bank at Portland, Indiana, for collection, with instructions to accept \$8,721 in full payment of the debt, which was \$250 less than the amount of the debt, if the payment was made on or before the 1st day of July, 1885; but if not paid on or before that day, seven per centum interest should be added to the amount. It is also alleged that Hammons did not pay any part of the debt until the 1st day of August, 1885; that on that day there was due, as principal and interest, \$8,624, and the sum of \$150 for attorney's fees; that on the day last named Hammons paid to the bank \$8,619.70, being \$160 less than the plaintiffs authorized the bank to receive, as Hammons knew, and being \$300 less than the amount due; that the bank, in disobedience of its instructions, delivered to the defendant a release.

It is further averred that there is due upon the bond and mortgage the sum of \$500, which is unpaid.

The appellants' counsel assume that the second paragraph of the complaint avers simply that nothing more than the amount stipulated to be paid as attorney's fees is due upon the bond and mortgage; but in this they are in error, for the pleading shows that more was due and unpaid.

It is further insisted that the appellees are bound by the

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act of the bank, because it was their agent; but this position is not tenable, for the reason that the complaint avers that the appellants knew the extent of the agent's authority.

We think the second paragraph of the complaint is good, in so far as the demurrer assails it upon the ground that it does not state a cause of action.

The objection that there was a defect of parties defendants was also made by the demurrer; this objection is valid as to the first paragraph of the complaint, but not as to the second. The owner of the land is a necessary party to a suit to foreclose, but where the land has been sold and conveyed, the mortgagor is not a necessary party, although he is a proper party. 2 Jones Mortgages, section 1394.

The judgment is reversed, with instructions to sustain the demurrer to the first paragraph of the complaint.

Filed May 29, 1888; petition for a rehearing overruled June 28, 1888.

 No. 13,696.

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SUMMONS.—*Precipe for.*—*Endorsement on Complaint.*—*Statute.*—An endorsement on a complaint, "Clerk will docket this cause for trial January 10th, 1887, and issue summons returnable that date," signed by the plaintiff's attorneys, is in substantial compliance with the provisions of section 516, R. S. 1881, and authorizes the issuance of a summons and fixes the day at which it shall be made returnable.

SUPREME COURT.—*Practice.*—*Pleading.*—When the sufficiency of a complaint is first attacked in the Supreme Court, the question of its sufficiency has relation only to the time at which judgment was rendered upon it, and to the form in which it is found in the record.

115	367
143	80
115	367
163	118

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PRACTICE.—Pleading.—Demurrer.—Abandonment of.—A demurrer to a complaint will be deemed to be abandoned, where the defendant files an answer without first requiring a decision on the demurrer, and such party will be precluded from thereafter making any question upon it.

TRIAL BY JURY.—Waiver of.—The right to a trial by jury is waived by a party who fails to appear to the action at the time of the trial.

SAME.—Foreclosure of Mortgage.—Equitable Jurisdiction.—The foreclosure of a mortgage is a matter of exclusively equitable jurisdiction; and in such proceeding a jury can not be demanded.

EVIDENCE.—Endorsement of Recorder on Deed or Mortgage.—An endorsement made and signed by a recorder, on a deed or mortgage, stating the date of the reception of the instrument for record and the fact of its being recorded in a certain book, may, in the absence of better evidence, be read in evidence touching the matters to which it relates, in connection with such instrument.

From the Warrick Circuit Court.

J. A. Moore and C. E. Barrett, for appellants.

J. S. Buchanan and C. Buchanan, for appellee.

NIBLACK, J.—On the 28th day of November, 1884, Mrs. Mattie Charles became indebted to Mrs. Lucinda C. Glover, in the sum of three thousand dollars, and she, on that day, in conjunction with her husband, Willis Charles, executed to Mrs. Glover her promissory note for that sum, payable one year after date at the Evansville National Bank, with eight per cent. interest from date, and attorney's fees. To secure the payment of this note, Mrs. Charles, at the same time, executed a mortgage on three lots in the city of Evansville, which were her separate property. Willis Charles, the husband, also joined in the execution of this mortgage. These lots were afterwards sold and conveyed by Mrs. Charles and her husband to Edwin Walker, and were by him sold and conveyed to Silas Rhoads. Rhoads in turn sold and conveyed the lots to John W. Compton, who afterwards sold and conveyed the same to Joseph A. Moore. All the conveyances were subject to the mortgage executed by Mrs. Charles and her husband as above. The conveyance from Compton to Moore specified that the property was subject to an encumbrance of three thousand and seventy dollars.

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Moore went into and still continues to be in possession of the mortgaged property.

On the 23d day of December, 1886, Mrs. Glover filed her complaint in the superior court of Vanderburgh county, praying for judgment on the note given to her by Mrs. Charles and her husband as stated, and for a foreclosure of the mortgage which was executed to secure its payment, and making the said Mattie Charles and Willis Charles, Edwin Walker, John W. Compton, Joseph A. Moore and Mary S. Moore, the wife of Joseph A. Moore, defendants to the suit.

At the time the complaint was filed it had upon it the following endorsement: "Clerk will docket this cause for trial January 10th, 1887, and issue summons returnable that date. J. S. & C. Buchanan, Att'ys for Pl'ff."

After the time named for the return of the summons, Moore and wife entered a special appearance to the action, and moved to "set aside, suppress and quash the summons and the service thereof," upon the ground that the endorsement on the complaint, set out as above, was not a substantial compliance with the provisions of section 516, R. S. 1881, and that hence the summons had been improvidently issued, but their motion was overruled.

Moore and wife then filed a demurrer to the complaint, but before any decision was made upon their demurrer they answered in denial, and also setting up special matters in defence, and the plaintiff replied in denial of such special matters. Compton also answered in denial of the complaint.

Thereupon, on the application of Moore, the venue was changed and the cause was sent to the Warrick Circuit Court for trial, where the papers and a transcript of the proceedings which had been had in the superior court of Vanderburgh county were filed on the 11th day of February, 1887.

On the 9th day of March, 1887, which was the third judicial day of the March term of the Warrick Circuit Court of that year, the cause was called and, no one appearing for

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the defendants, a default was entered against Mrs. Charles, Willis Charles and Edwin Walker, and, the cause being, on motion of the plaintiff, submitted to the court for trial on the issues formed between the plaintiff and the defendants Moore and wife and Compton, and the default of the remaining defendants, and the evidence being heard, the court found that there was due to the plaintiff on the note described in the complaint the sum of three thousand three hundred and fifty-nine dollars, and that the plaintiff was entitled to have the mortgage foreclosed for the payment of the sum of money so found to be due.

A personal judgment was thereupon rendered against some of the defendants other than Moore, and a decree of foreclosure was entered against all the defendants.

Later in the term, that is to say, on the 21st day of March, 1887, Moore appeared in the Warrick Circuit Court, and, upon his petition in writing, representing under oath that neither he nor his attorney had ever received any notice that the cause had been set down for trial, or would be called for trial on the preceding 9th day of that month, and that the court had been misled by an assurance that there was no defence to the action, moved the court to set aside the judgment and decree entered in the cause, and to grant him leave to defend the action on its merits. This motion being overruled, Moore moved for a new trial for the alleged cause, amongst others, that the finding made at the hearing was not sustained by sufficient evidence, and that motion was also denied.

Although the names of all the defendants below are used as appellants here, Joseph A. Moore is, for all practical purposes, the only appellant, since he was the only defendant who reserved exceptions to the proceedings below in any matter having the semblance of materiality. Error is, nevertheless, assigned in the name of all who were defendants in the courts below upon the alleged insufficiency of the complaint to support the judgment and decree which rest

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upon it. As against the sufficiency of the complaint, the point is made that neither the note nor mortgage was with the complaint when it was filed, and that, therefore, it was then an insufficient complaint and so continued to be, as no formal amendment was afterwards made to it. In referring to the note and mortgage the complaint said: "Copies of said mortgage and note are filed herewith and made part hereof, marked exhibits A and B." We find the mortgage and note copied into the transcript before us, immediately succeeding the complaint, marked as exhibit A and exhibit B, respectively. On the margin of the transcript opposite to the mortgage there is a memorandum, purporting to have been made by the proper clerk, that the mortgage or a copy was filed January 17th, 1887. On the margin opposite the note there is a similar memorandum indicating that the note or a copy was filed on the 27th day of January, 1887. Notwithstanding these memorandums, the mortgage and note may have been deposited with the clerk when the complaint was filed, and hence, in legal contemplation, then filed, but however that may have been, they were filed in time to complete the sufficiency of the complaint some time before the cause was called for trial, as well as before judgment was pronounced upon it. When the sufficiency of a complaint is first attacked in this court, the question of its sufficiency has relation only to the time at which judgment was rendered upon it, and to the form in which it is found in the record.

A complaint, in common with other pleadings, is, in a general sense, open to amendment until the close of the trial, and all amendments which may have been made during the progress of the cause will be presumed to have been made by leave of the court. Section 396, R. S. 1881.

Moore, on his own behalf, assigns error upon the refusal of the superior court of Vanderburgh county to quash the summons, and in support of his assignment repeats the reasons urged by him in presenting his motion below.

No substantial objection to the sufficiency of the endorse-

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ment made on the complaint has been pointed out, and we see no reason for holding that it did not authorize the issuance of a summons and fix the day at which it should be made returnable. This view is fully sustained by the case of *Johnson v. Lynch*, 87 Ind. 326.

Moore also makes the point that his demurrer to the complaint ought to have been sustained. But, as has been shown, he answered without first requiring a decision upon his demurrer. That was a practical abandonment of the demurrer and precluded him from thereafter making any question upon it. 1 Works Practice, section 539.

Moore further complains that as no day had been previously fixed for the trial of the cause, his failure to be present either in person or by counsel when it was called and tried, was an excusable neglect, and that, under such circumstances, the court below ought to have set aside its finding and judgment against him, and thus allow him the benefit of a full defence to the action.

For aught that appears in Moore's application to have the finding and judgment set aside, or in any other part of the record, the cause may have regularly stood for trial on the docket for the day on which it was called and disposed of, and was hence reached for trial in its proper order. Section 518, R. S. 1881. Besides, when a cause is called on the second, or some subsequent day of the term, for issues or trial, and there is no appearance for the defendant, the cause may be proceeded with in his absence. Sections 400, 401, 403, R. S. 1881. But Moore made no showing of a meritorious defence. He is, therefore, not in a position to complain that he was not permitted to defend, in the absence of an affirmative allegation that he had a real defence.

Moore still further complains that, under the Constitution and laws of the State, he was entitled to have had the cause tried by a jury; that, in consequence, the Warrick Circuit Court erred in trying the cause, in his absence, and upon its own motion, without a jury, and that, for that reason, if for

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no other, the finding and judgment against him ought to have been set aside.

In the first place, Moore waived his right to a trial by a jury by his failure to appear to the action at the time of the trial. Section 550, R. S. 1881. In the next place, the foreclosure of a mortgage is a matter of exclusively equitable jurisdiction, and hence the proceeding was one in which Moore had no right to demand a jury. R. S. 1881, section 409; *Rogers v. Union Central Life Ins. Co.*, 111 Ind. 343.

The mortgage in suit had the following endorsement upon it which had been made and signed by the recorder of Vanderburgh county: "Received for record the 1st day of December, 1884, at 11 o'clock A. M., and recorded in record 19, page 417," and this endorsement was, with the mortgage, read in evidence at the trial.

This was the only thing introduced as evidence which could be construed as tending to prove that the mortgage had been recorded.

It is insisted that there was at the time, and still is, no law in this State either authorizing or requiring such an endorsement as that so read in evidence to be made upon a deed or mortgage when it has been recorded, and that, in consequence, the endorsement neither proved, nor tended to prove, any fact recited by it.

Although there is, perhaps, and probably has been, no law expressly authorizing or requiring such an endorsement to be made upon a deed or mortgage, such and similar endorsements are, and from an early period have been, made in accordance with a long and firmly established practice in this State, and, when made, they become an incidental and proper appendage to the instruments upon which they are respectively entered, and, in the absence of better evidence, may be read in evidence touching the matters to which they relate, in connection with the instruments to which they are attached.

The endorsement read in evidence in this case was so read in the absence of the defendants below, and without objec-

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tion from any person acting on their behalf, or on behalf of any one of them. Having been so read in evidence, the endorsement tended to prove that the mortgage had been recorded as of the date at which it was received for record. Besides, there was evidence from which the circuit court might reasonably have inferred that the encumbrance named in the deed from Compton to Moore had reference to the mortgage sought to be foreclosed, and that hence Moore had actual notice of the existence of the mortgage at the time of his purchase of the mortgaged property.

The judgment is affirmed, at the costs of the appellant Moore.

Filed March 22, 1888; petition for a rehearing overruled June 23, 1888.

No. 13,115.

MITCHELL v. HARTLEP.

PROMISSORY NOTE.—Assignment.—Agreement of Assignee to Pay for Note if He Uses it.—Where one takes the assignment of a promissory note, agreeing to pay a certain sum therefor if he can use it, the subsequent use of the note as a cause of action renders him liable for the stipulated consideration, although it may not appear that he received any money upon it.

From the Warren Circuit Court.

J. W. Cole, for appellant.

J. McCabe and *E. F. McCabe*, for appellee.

ELLIOTT, J.—The appellee sought and obtained a review of a judgment rendered against him. In his complaint for

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review he alleges generally that the court erred in its rulings, and we are inclined to the opinion that many of his allegations are so indefinite and uncertain as to be insufficient, but we do not decide anything upon this point, for we are satisfied that even if it be conceded that the allegations are all sufficiently specific, the record filed with the complaint shows that the first judgment was right and the last wrong.

The material facts, briefly stated, are these: The appellant held a promissory note executed by John W. Cole and assigned and delivered it to the appellee, who thereupon executed the following agreement:

"August 16th, 1882. If I can use the John W. Cole note to J. B. Mitchell, I will pay A. Mitchell seventy-six dollars."

The appellee subsequently brought an action on this note against the maker, but joined in the same suit other causes of action. A trial was had, and the appellee obtained judgment against Cole for ten dollars, but the note was not introduced in evidence. The record does not inform us why the note was not read in evidence, nor on what claim the judgment against Cole was founded.

It appears from the record that the appellee did use the note assigned to him. It is true that it does not affirmatively show that he received any money on it, but it does show that he used it as a cause of action. It is, indeed, doubtful whether he did not make such a use of it as to preclude any action upon it, but we need not decide whether the use he made of it did have this effect, for, it is quite clear, even conceding that there was not an adjudication upon it, that the use made of it was such as to embarrass the assignor.

There is, at least, a question as to the right to maintain a second suit upon it, and this question arises out of the use the appellee made of it, and it seems to us that having to that extent used the note, he must perform his contract. He certainly did make some use of the note, by filing it as a cause of action, and as that use clouds and obstructs the right to again sue upon it, he can not repudiate his contract. His

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use has put some obstruction in the way of collecting the note, if, indeed, it has not completely barred another action upon it, and justice requires that he, and not the person from whom he acquired the note, should assume the expense and risk of collecting it. He did make use of the note, and this, certainly, is sufficient to charge him, unless he shows that it was not his fault that he did not make the use successful. If he had shown that he could not successfully use the note because of a defence existing against his assignor, then there would be much reason for exonerating him from his contract; but it does not appear that there was any cause for his failure except that which is chargeable to his own conduct.

Judgment reversed.

Filed April 17, 1888.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—As we said in our original opinion, the controlling question in this case is whether the appellee did use the promissory note assigned to him by the appellant. That he did use it there can be no doubt, for he filed it as a cause of action against the maker in an action regularly brought. It is true that the appellee did not take judgment on the note, but why he did not the record does not inform us. He agreed to pay for the note in the event that he used it, and as he did use it we can perceive no reason why he should not be held to his contract. To us it seems clear that, where a party agrees to pay for a thing if he uses it, he becomes bound the moment he makes use of the thing for which he bargained.

Counsel put much more of assertion than of argument into their brief, and make many assumptions that can not be sustained. They forget that their client promised to pay for the note if he could use it, and, omitting this important fact, argue that the judgment rendered in the action in which the note was sued on was not conclusive. We think it imma-

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terial whether the judgment was or was not conclusive, for the appellant elected to make use of the note, and, for anything that appears, might have made a successful use of it if he had done his duty. As we said in our former opinion, there is nothing to show that he might not have obtained judgment, for surely the note constituted a *prima facie* cause of action. Its bare production would have entitled him to judgment, unless a defence was successfully established. But, after all, the case must be decided against him irrespective of this consideration, because he did elect to use the note.

If the appellant had averred that there was a mistake in reducing the contract to writing, there would be much more of relevancy in counsel's argument, but no such issue was tendered. The contract as it is written does not, as counsel unwarrantably assume it does, restrict the use to any particular method, but, on the contrary, provides that if any use is made of the note the appellant shall pay for it. In order to make the contract mean what counsel assume it does mean, it would be necessary to interpolate important words.

Petition overruled.

Filed June 28, 1888.

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No. 11,891.

**THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. WRIGHT.**

RAILROAD.—Negligence.—Overhead Bridges.—Brakeman.—One entering the service of a railroad company as brakeman has the right to assume that the company has constructed and maintained its roadway and bridges in such a manner that he can perform his duties with reasonable safety, and that if there is a low bridge or any such danger to be encountered in the service, he will be warned of it.

SAME.—Duty of Master to Inform Employee of Unusual Risk.—Where there are dangers and hazards known to the master, or of which he ought to have knowledge by the use of ordinary care, and which are not ordinarily and usually incident to the business, it is his duty to inform the employee of such danger when hiring him, unless the danger is so apparent that the latter will be bound to take notice of it.

SAME.—Assumption of Risk by Brakeman.—Unusual Dangers.—A person contracting to work upon a railroad as brakeman assumes the risks ordinarily and properly incident to such service, but he does not assume the risk of unusual dangers, such as result from low overhead bridges, of the perilous character of which he has no knowledge, or of which he is not bound to take notice.

SAME.—Negligence to Maintain Low Bridge.—A railroad company which constructs and maintains a bridge over its track so low that a brakeman can not, while his train is passing thereunder, walk or stand upon the cars, or even apply the brakes, without injury, is guilty of negligence, and liable to one who, having no knowledge of the peril, is injured while in the discharge of his duty.

SAME.—Maintenance of Low Bridges by Other Railroads.—Evidence.—In such a case, evidence that there are bridges on all railroads in the United States too low for brakemen, standing or walking upon ordinary box-cars, to pass under with safety, is not competent.

SAME.—Evidence of Injury to Other Persons.—Notice to Company of Dangerous Character of Bridge.—Evidence that other persons were previously injured by coming in contact with the bridge, while passing thereunder upon moving trains, is competent as showing notice on the part of the railroad company that the bridge was dangerous.

EVIDENCE.—Offer of Compromise.—Admissions.—A letter written by a plaintiff, prior to the commencement of his action, and containing admissions made simply to open the way to a compromise, or as a part of an attempted compromise, is not admissible against him.

115	378
117	266
115	378
127	58
115	378
124	158
134	640
136	468
136	484
115	378
138	19
139	146
139	278
115	378
146	569
115	378
152	595
152	600
115	378
154	177
156	277
115	378
160	326
115	378
164	111

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SAME.—Physician.—Opinion as to Probable Effect of Injuries.—It is competent for an attending physician, after stating the character and condition of the injuries sued for, to give his opinion as to the probable results of such injuries, although he did not continuously attend the injured person to the time of the trial, and it is also competent to embody the facts stated by him in a hypothetical question put to another physician.

INSTRUCTIONS TO JURY.—Overhead Bridge.—Negligence.—Practice.—For a consideration of instructions touching the principles involved in an action for injuries caused by an overhead bridge, and also for a statement of rules of practice relating to the bringing of instructions into the record and their consideration on appeal, see opinion.

BILL OF EXCEPTIONS.—Practice.—A bill of exceptions may properly be in the record, although the rendition of the judgment and the approval of an appeal bond intervene between the overruling of the motion for a new trial and the giving of time within which to file the bill.

From the Jasper Circuit Court.

W. F. Stillwell, G. W. Friedley and G. W. Easley, for appellant.

W. P. Adkinson, M. F. Chilcote, J. P. Wright and E. P. Hammond, for appellee.

ZOLLARS, J.—It is charged in the complaint that near Putnamville the track of the railroad is laid in a deep cut over which is a bridge upon a public highway; that the railroad company negligently constructed, and has negligently maintained, the bridge so low as not to afford sufficient space to allow brakemen walking or standing upon freight cars in the discharge of their duty in the management of trains to pass under it with safety; that the railway company could, and should, have so constructed the bridge that brakemen could thus pass under it in safety; that it had full knowledge that the bridge was dangerous to its brakemen operating its trains; that it negligently failed to place upon or about the bridge lights or other danger signals in common use with well managed railways, to warn brakemen of the danger.

It is further alleged that on, and for a short time prior to, January 13th, 1882, appellee was engaged in the service of the railway company as a brakeman upon a freight train

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which passed back and forth over the road, under the bridge, and that with full knowledge of the dangerous condition of the bridge, the railway company negligently failed to notify him of the danger; that when the train upon which he was engaged as a brakeman was approaching the bridge at about 3 o'clock A. M. of January 13th, 1882, and when the rain was falling and a heavy fog and intense darkness covered everything, so that appellee could not see or determine what point the train was passing or approaching, and being unacquainted with that part of the railway, and not knowing that the train was approaching a dangerous bridge, appellee obeyed a call to brakes made by the engineer in charge of the engine and went upon the top of the cars to set the brakes, as it was his duty to do as such brakeman, and that while setting the brakes the train passed under the bridge, which, without any fault or negligence on his part, was brought in contact with the back part of his head with such force as to fracture his skull, thereby rendering him unconscious for weeks, causing him great suffering, both physical and mental, so as to impair his mind, causing paralysis of his right side, and thus rendering him a cripple for life, so that he is, and will continue to be, unable to make a living by manual or mental labor. The complaint closes with a general charge that all of the injuries were the result of negligence on the part of the railway company, and without negligence on the part of appellee.

A motion was made below for an order upon appellee to make the complaint more specific. The motion was overruled.

We have considered the arguments of counsel in support of the motion, but do not think that the matter is of sufficient importance to require more than a statement that, whether the ruling of the court below was right or wrong, no substantial injury could result to appellant.

The court below overruled a demurrer to the complaint, and also a motion by appellant for judgment in its favor

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upon the answers of the jury to the interrogatories submitted by its counsel. Those rulings are assigned as errors. They may be considered together.

The substance of the answers of the jury to the interrogatories, so far as material, is as follows:

At the time of the injury to appellee, the railway company was maintaining, and for seven years prior thereto had maintained, an overhead bridge upon a highway crossing its track a short distance south of the town of Putnamville. The distance from the top of the rails upon the track to the bridge above was, and is, fifteen feet and nine inches. The box freight cars used by appellant were eleven feet high. Neither appellee nor any other full grown man could walk or stand erect upon the top of such box-cars passing upon the track under the bridge without coming in contact with it. The only way in which appellee could have passed under the bridge in safety, when upon the top of such box-cars, was to sit down, or stoop very low. He could neither sit down nor stoop low enough to escape danger, and at the same time apply the brakes. The railway company neither erected nor maintained any danger signals to warn brakemen of the approach to or nearness of the bridge. By reason of the lowness of the bridge, and the lack of danger signals, the service of a brakeman upon appellant's freight trains over that part of its road was a hazardous and dangerous service, and that fact and all other facts in relation to the bridge were known to the railway company before and at the time it employed appellee as a brakeman, and at the time he was injured. Previous to his employment upon appellant's road, appellee had had about one month's experience as a brakeman upon the Ohio and Mississippi Railroad. He was first employed by appellant on the 5th day of October, 1881, as a brakeman upon a freight train, his run being from New Albany to Greencastle, and continued in the service until the 4th day of November, 1881. That run carried him under the bridge in question. During that employment he

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passed with his train under the bridge from eight to ten times in the daytime, and the same number of times in the night. Subsequently, and on the 11th or 12th day of January, 1882, appellee was again employed by the railway company as a head brakeman to assist in operating freight trains, his run, as before, being from New Albany to Greencastle, and under the low bridge. From his first employment up to the time of his injury, he had passed under the bridge from seventeen to twenty times, one-half of the number being in the night-time. At no time previous to his injury did he know that the bridge was too low to allow him to pass under it with safety when standing or walking upon the box-cars in attending to the brakes. He had no knowledge that the service was a hazardous one, by reason of the low bridge, and was not notified of that fact, nor of any fact as connected with the bridge, either by the railway company or any other person. The jury further answered, that, prior to his injury, appellee did not have an opportunity to know that the bridge was too low to allow him to pass under it with safety when standing or walking upon the top of freight cars. They also answered, that he made no effort to ascertain the height of the bridge, or whether or not he could with safety pass under it when upon the top of box-cars attending to the brakes.

They further answered that the danger of brakemen being struck by the bridge was an open and obvious one in the daytime, but not at night. They still further answered, that, during the time appellee was in the employ of the railway company, he could not, by an ordinarily careful use of the opportunities afforded him, have discovered that the bridge was so low as to be dangerous.

On the morning of the 13th day of January, 1882, when it was yet dark, appellee started with his train south from the Greencastle junction towards New Albany. He knew that the first station south was Putnamville, and that the bridge in question was near to and south of the station, but he did

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not know of the danger. When within about one-third of a mile of Putnamville, the engineer, by the use of the steam whistle, called for the setting of brakes. In obedience to that call, appellee went upon the top of the cars and moved from the front towards the rear end of the train, until he reached the brake. The train was moving over a down-grade, and did not stop at Putnamville, but passed through and under the bridge some fifteen hundred feet south, the engineer not having shut off the steam soon enough to stop the train at the station. As the train passed under the bridge, appellee being at the brake in a stooping posture, and his face towards the rear of the train, the bridge struck him upon the back of the head, about one and one-half inches from the top.

When called upon the top of the cars, appellee, because of the darkness, did not know what portion of the road the train was passing over. When the train was passing through Putnamville he was not aware of the fact, and when injured did not know that the train was near the bridge. After going upon the top of the cars he did not look in the direction in which the train was moving, and could not have seen the bridge had he looked, because of the darkness. Appellee could not, by the use of ordinary care and diligence, have avoided the injury.

In support of the motion for judgment in favor of the railway company upon the above answers to the interrogatories, its counsel argue that, upon the facts disclosed, it must be presumed and concluded as a matter of law that appellee contracted with the company with reference to the hazardous nature of the service, and that, therefore, he can not recover.

The objections urged to the complaint, as we gather from the argument, are :

First. That no facts are alleged showing that the railway company was under a duty to erect or maintain any other or different bridge from that in question ;

Second. That no facts are averred showing that it was the

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duty of the railway company to have warned appellee of the danger, because the danger was in its nature open and obvious;

Third. That it is not shown by the averments of the complaint that appellee's ignorance of the lowness of the bridge was not the result of want of ordinary care on his part;

Fourth. That no facts are averred showing that the bridge was not built in the usual and ordinary way, and of the usual and ordinary height; and,

Fifth. That it is not averred that appellee did not know that the bridge was dangerous by reason of being too low for a brakeman to pass safely under it when standing or walking upon the top of box-cars.

We think that the complaint sufficiently shows that appellee had no knowledge of the dangerous condition of the bridge. We think, too, that the complaint sufficiently shows that appellee's ignorance of the condition of the bridge was not the result of his own negligence. There is also a broad averment in the complaint that appellee received the injury without any negligence on his part. See *Town of Rushville v. Adams*, 107 Ind. 475, and cases there cited.

He was required to observe ordinary care for his own safety, but he was not required to go over the road upon a tour of inspection looking for defective bridges or faulty track before engaging in the service.

Because of its duty to him, appellee had the right to assume that the railway company had constructed and maintained its roadway and bridges in such a manner and condition that, as a brakeman upon its trains, he could perform his duties with reasonable safety, and that if there was any such danger to be encountered in the service as the low bridge, he would be warned of it.

In the case of *Boyce v. Fitzpatrick*, 80 Ind. 526, 529, in commenting upon cases cited, it was said: "These cases show that, while a servant assumes the risk, more or less hazardous, of the service in which he engages, he has a right to

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assume that all reasonable attention will be given by his employer to his safety, and that he shall not be carelessly and needlessly exposed to risks, which might be avoided by ordinary care and precaution on the part of his employer." See, also, *Rogers v. Overton*, 87 Ind. 410 (413).

In the recent case of *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151 (161), this court said that, as a general rule, in the contract of hiring there is an implied undertaking upon the part of the master that he will use all reasonable care to furnish safe premises, machinery and appliances for the conducting of the business safely.

In the recent case of *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88, 93, in speaking of low bridges, in a case in all essentials like that before us, and after citing the cases *pro* and *con*, it was said: "It seems to us that a railroad company is, and ought to be, required to construct and maintain its roadway and appendages, and its overhead structures, in such a manner and condition that its employee or servant can do and perform all the labors and duties required of him, with reasonable safety." See the cases there cited; see, also, *Indiana Car Co. v. Parker*, 100 Ind. 181; *Umbach v. Lake Shore, etc., R. W. Co.*, 83 Ind. 191; *Louisville, etc., R. R. Co. v. Orr*, 84 Ind. 50; *Atlas Engine Works v. Randall*, 100 Ind. 293 (50 Am. R. 798).

In the case of *Indianapolis, etc., R. R. Co. v. Love*, 10 Ind. 554, in speaking of the duty of the master to furnish a safe roadway, and to inform the servant of unusual dangers, it was said: "If a defect existed in the road which was known to the company, but which it was impossible for them to immediately remove or remedy, and in consequence thereof the road was unsafe but not impassable, and yet they should place an employee upon the road, and suffer him, in ignorance of said defect, to attempt to operate it, and injury should thereby result to him, certainly there would be a lia-

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bility." See, also, *Thayer v. St. Louis, etc., R. R. Co.*, 22 Ind. 26.

In the case of *Baxter v. Roberts*, 44 Cal. 187 (13 Am. R. 160), it was said: "That one contracting to perform labor or render service thereby takes upon himself such risks and only such as are necessarily and usually incident to the employment, is well settled. Nor is there any doubt that if the employer have knowledge or information showing that the particular employment is from extraneous causes known to him hazardous or dangerous to a degree beyond that which it fairly imports or is understood by the employee to be, he is bound to inform the latter of the fact or put him in possession of such information; these general principles of law are elementary and firmly established," etc.

The facts in the case of *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183, in brief, were these: The railroad track at Mendota was about eighteen inches from the edge of an awning, which projected from the station-house, so that when a freight car stood upon the track the inside edge of the car was about even with the outer edge of the awning. The awning was about eighteen inches higher than the car. There being a signal for brakes, the plaintiff in the case, a brakeman, ran upon the ladder on the side of a car, and before reaching the roof was struck by the awning and injured. It was insisted in behalf of the railway company, that there could be no recovery, for the reason that the brakeman had assumed the risks incident to the service, and had an opportunity to know of the danger from the awning. In answer to that contention the court said: "There are many freight depots and station-houses upon the line of the Central Railway, and it would be preposterous in us to say, or to ask a jury to say, that a brakeman engaging in the service of the company must be held to know whether or not there may be one among them whose roof or awning so projects over the line of road that a brakeman on a freight train, in the performance of his duties, would be liable to be swept from the train by a col-

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lision with it. We held, in the *Chicago & N. W. R. R. Co. v. Swett*, 45 Ill. 201, that the corporation is bound to furnish to its servants safe materials and structures, and must, in the first instance, properly construct its road with all its necessary appurtenances. This, of course, includes the obligation to keep in proper repair. When the appellee entered the service of this company, he had a right to presume that it had, in these respects, discharged its obligations. The ordinary perils of railroad life he of course assumed, and also any special dangers arising from the peculiar condition of the road so far as he knew of their existence. * * * But it would have been morally impossible for him to have ascertained the existence of all such special perils as this which caused the injury, and there is no reason for supposing that he had acquired such knowledge before the accident, as he had been but two months upon the road, and had always passed the station, where he was injured, in the night, except upon two trips. Moreover, it is to be remarked that the danger was of such a character that it might well escape the observation of a person who had been even for a long time upon the road."

In Mr. Wood's work on Railway Law, vol. 3, at pages 1480-1, in speaking of low bridges, and the cases in which it was held that the railway company was not liable, it is said that the doctrine of those cases proceeds upon the ground that the servant knew of the hazard, and, therefore, assumed the risk incident to it, and that the master will be liable, where the circumstances are such that the servant can not be charged with such knowledge.

As it is the duty of the master to inform his servant of increased danger and hazard created by him in the change of machinery or premises, unless the servant has notice, or the change and increased danger are so apparent that he ought to take notice, so, where there are dangers and hazards known to the master, or of which he ought to have knowledge by the use of ordinary care, and which are not ordinarily and

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usually incident to the business, he should inform the servant of such danger when hiring him, unless the danger is so apparent that the servant will be bound to take notice of it. *Hawkins v. Johnson*, 105 Ind. 29, 35 (55 Am. R. 169); *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151 (165); *Bradbury v. Goodwin*, 108 Ind. 286.

A person contracting to work upon a railway as a brakeman, assumes the risks ordinarily and properly incident to such service, but he does not, by such hiring, assume the risk of unusual dangers of which he has no knowledge, or of which he is not bound to take notice.

It can not be said here that, by the contract of hiring, appellee assumed the risk of injury from the bridge by which he was injured. Clearly, it ought not to be said that the railway company was under no duty to build and maintain the bridge in a different manner and condition from what it did. It is charged in the complaint, and shown by the answers of the jury to the interrogatories, that the railway company was guilty of negligence, both in the building and maintenance of the bridge.

It is charged in the complaint that, it was so low that a brakeman, in the discharge of his duty in setting brakes, could not, without injury, walk or stand upon the top of the cars. It is shown by the answers of the jury to the interrogatories that the distance from the top of the rails to the bridge was fifteen feet and nine inches, and that the box-cars were eleven feet high, thus leaving a space of four feet and nine inches only between the top of the cars and the bridge. To say that a railway company has performed its whole duty when it erects and maintains such a bridge is, in effect, to say that it may abandon all reasonable care for the safety of its brakemen upon its trains. At best, that service is hazardous enough. Surely, the railway companies should not increase the danger by the erection and maintenance of such low bridges. All reasonable precautions ought to be taken to decrease the danger as much as possible. There can be no

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sufficient reason for a holding that while the railway company must exercise reasonable care to provide a safe roadway and bridges below, it may abandon, to a large extent, all care as to bridges above.

Called, as they often are, to their brakes, upon the top of the train in rainy and dark nights, when they have no means of determining exactly the portion of the road over which the train is passing, it might be expected that brakemen will be injured by collisions with bridges such as that described in the complaint and the answers of the jury to the interrogatories.

Assuming that railway companies perform the duties which they owe to their employees, it can not be conceded that the bridge in question was built of the usual and ordinary height.

There is nothing in the complaint or the answers of the jury to the interrogatories showing, or tending to show, that it is a usual or customary thing for railway companies to build and maintain overhead bridges so low as that which caused the injury to appellee.

It is shown that appellee had no knowledge of the condition of the bridge, and that his want of knowledge was not the result of negligence on his part. Because of his want of knowledge, and the increased and unusual hazard caused by the lowness of the bridge, it can not be said that appellee voluntarily assumed the risk of injury therefrom.

Both the demurrer to the complaint, and the motion for judgment in favor of appellant upon the interrogatories, were properly overruled.

In answer to their contention that the bill of exceptions is not in the record, because the rendition of the judgment and the approval of an appeal bond intervened between the overruling of the motion for a new trial and the giving of time within which to file a bill of exceptions, we refer appellee's counsel to the recent case of *Kopelke v. Kopelke*, 112 Ind. 435.

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Appellant's counsel offered to prove that there are bridges on all railways in the United States too low for brakemen, standing or walking upon the top of ordinary box-cars, to pass under with safety. The court below did not err in excluding the evidence. As we have seen, a railway company falls short of its duty if it constructs overhead bridges so low as to be dangerous to its brakemen in the discharge of their duties. If such bridges are constructed, it is the duty of the company to notify its brakemen of the danger, unless they already have knowledge, or the circumstances are such that they are bound to take notice. That other companies may have neglected their duty and built and maintained low and dangerous bridges, can not exonerate, or tend to exonerate, appellant from liability. There may be some such bridges upon other roads, but there was no offer to prove that they are in such general use as to be an ordinary and usual incident of the service of brakemen. Here, appellee had had but two months experience as a brakeman, and had no knowledge of the low bridge. The fact that other railway companies may have maintained some of their bridges so low as to be dangerous, is not sufficient to charge appellee with notice here. If such low bridges are thus maintained, they are surely the exception and not the rule. *Louisville, etc., R. W. Co. v. Pedigo*, 108 Ind. 481.

Appellant's counsel first offered to introduce in evidence a letter, and, second, a portion of a letter, written by appellee to an officer of the railway company before this action was commenced. It is earnestly insisted that the court erred in excluding the letter and the portion thus offered. The letter was written in answer to one received by appellee. It is well settled that an offer or proposition for a compromise of a legal controversy, not accepted, is not competent evidence for or against either party. *Board, etc., v. Verbarg*, 63 Ind. 107; *Dailey v. Coons*, 64 Ind. 545.

It is also settled that an admission of an independent fact

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in no way connected with the offer of compromise, although made during the negotiations, is competent evidence.

In the case of *Wilt v. Bird*, 7 Blackf. 258, it was said: "An offer, concession, or admission, made in the course of an ineffectual treaty of compromise, and constituting, in itself, the point yielded for the sake of peace, and not because it was just or true, is not competent evidence against the party making it; but the law is otherwise with regard to an independent fact admitted to be true, but not constituting such yielded point."

An admission of a fact, not made simply because it is a fact, but expressly or clearly for the sake of, and as a part of an attempted compromise, is not competent evidence in a subsequent action against the party making it. *Cates v. Kellogg*, 9 Ind. 506.

And so, if an admission is made not simply because it is a fact, but to open the way to a compromise, it is not admissible. *Binford v. Young*, ante, p. 174.

That the letter, as a whole, constituted an offer of compromise, is not questioned. We have examined the letter carefully, and are fully persuaded that no portion of it is competent evidence in this action against appellee.

It is very apparent that nothing was admitted as an independent fact, simply because it was a fact, if, indeed, it can be said that there is any admission or statement that could in any way be beneficial to appellant. On the other hand, it seems very clear to us that all that was written was by way of argument for the purpose of bringing about an adjustment to avoid litigation. The whole letter had that single object in view, and, as said in the case of *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527 (548), in speaking of an offer to introduce a portion of a letter, written with the object of effecting a compromise, "it contains no statement which can be separated from the offer and convey the idea which was in the writer's mind."

Dr. S. W. Yost, at the time of the trial, had been a practising

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physician and surgeon for more than twenty years. *Prima facie*, at least, that rendered him competent to give an opinion as to the probable result of appellee's injuries. He had attended him as physician for some two months after he was injured, at which time he was also in the employ of the railway company as surgeon.

After stating in detail appellee's condition, and the character and condition of his wounds at the time he attended him, he was allowed to state that the probabilities are that he will never, to any great extent, be able to perform manual or mental labor, without a removal of a depressed portion of the bone which was, and is, pressing upon the brain, by reason of the wound upon the head, and that such an operation would be fraught with great danger. It was competent for Dr. Yost to give his opinion as to the probable results of appellee's injuries. *Carthage T. P. Co. v. Andrews*, 102 Ind. 138, 145 (52 Am. R. 653); *Louisville, etc., R. W. Co. v. Wood*, 113 Ind. 544; *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409; *City of Fort Wayne v. Coombs*, 107 Ind. 75.

His evidence in that regard was not incompetent because he had not attended appellee continuously up to the time of the trial. He could state his opinion, based upon his knowledge and observation at the time he attended appellee. Had he attended him continuously his testimony might have been of more weight, but it would have been no more competent.

Objections were made below, and are urged here, to the testimony of Dr. Harry L. Taylor. He had been a physician and surgeon since 1872, and at the time of the trial was a professor in the Indiana Eclectic Medical College. *Prima facie*, he was competent to give an opinion as to the probable results of the fracture of appellee's skull. Dr. Yost had given a detailed statement of appellee's condition for two months after he had received the injury. A hypothetical question, involving the facts as stated by him, was propounded to Dr. Taylor, and upon that he was allowed to give his opinion as to the probable results of the injuries. The

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testimony of Dr. Yost as to appellee's condition at the time he attended and treated him, was competent evidence in the case, and hence it was competent to embody the facts so given in a hypothetical question to Dr. Taylor. Here, again, the testimony of Dr. Taylor was competent, although it might have been of more weight and importance had it been based upon a hypothetical question embodying the facts as to appellee's condition at the time of the trial.

With a description of the locality, the height of the bridge, and a statement that no danger signals were kept at the bridge, John B. Cooper was allowed to state that, prior to the injury to appellee, three persons, giving their names, being upon the top of moving trains, were injured and crippled by coming in contact with the bridge, some of whom died from the effects of the injuries.

There is some conflict in the authorities, but under our cases, supported by many others, the evidence was competent as tending to show notice on the part of the railway company that the bridge was dangerous. It would not be profitable here to do more than cite the cases. See *City of Delphi v. Lowery*, 74 Ind. 520, 523 (39 Am. R. 98), and cases there cited; *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264 (54 Am. R. 312); *City of Fort Wayne v. Coombs*, *supra*.

The arguments by appellant's counsel upon the instructions given and refused, are elaborate, and such as to challenge careful consideration, were the instruction in the record. We are met, however, with the contention on the part of appellee's counsel that the instructions are not in the record, for the reason that the record contains no evidence that they were ever filed. They are not embodied in a bill of exceptions. The clerk has copied the instructions into the transcript, but, as contended by appellee's counsel, there is nothing to show that they were ever filed, and hence can not be regarded as a part of the record. As said in the case of *O'Donald v. Constant*, 82 Ind. 212: "The transcript contains no copy of the clerk's notation of the filing, nor

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any recital that they were filed." Not being a part of the record, the instructions found in the transcript can not be considered by this court. To bring instructions into the record without a bill of exceptions, the statute imperatively requires that they shall be signed by the judge and filed. That they must be thus filed, is a rule of practice established by the Legislature, which this court could not change, if such a change were desired. See R. S. 1881, section 533, clause 6; *Supreme Lodge Knights of Honor v. Johnson*, 78 Ind. 110; *Elliott v. Russell*, 92 Ind. 526, and cases there cited; *Olds v. Deckman*, 98 Ind. 162, and cases there cited; *Landwerlen v. Wheeler*, 106 Ind. 523; *Childress v. Callender*, 108 Ind. 394; *Fort Wayne, etc., R. W. Co. v. Beyerle*, 110 Ind. 100.

It is further contended by counsel for appellant that the verdict and judgment are not supported by sufficient evidence, and are contrary to law. It may be said that it was possible for appellee, while in the employ of the railway company, to have discovered that the bridge was dangerous. He, however, testified positively that he did not know that it was dangerous, and the other facts stated by him and other witnesses are not such as to justify this court in holding, as a matter of law, that he was bound to take notice and exercise the necessary precautions, having such notice, to avoid injury.

Nor can this court, considering all of the evidence in the case, say that the judgment for \$10,000 is excessive.

Judgment affirmed, with costs.

Filed March 23, 1888.

ON PETITION FOR A REHEARING.

ZOLLARS, J.—It was held in the principal opinion that we could not, over appellee's objection, decide the questions made upon the giving and refusal of instructions, for the reason, as then stated, that, although the clerk had copied into the record what purported to be instructions given and refused, there was nothing to show that they had been filed, as required by

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the statute, in order that they might become a part of the record without a bill of exceptions.

In its petition for a rehearing appellant's counsel cite us to another portion of the record where the instructions thus given and refused are embodied in a bill of exceptions. This they should have done in their original briefs, as required by Rule 19 of this court.

The question was made in appellee's brief, and in his counsel's statement of points for oral argument, that the instructions were not in the record, for the reasons above stated, and stated in the principal opinion. Appellant's counsel now claim that they met the question thus made in their oral arguments.

If their recollections are correct, ours are at fault. However that may be, as the case is an important one, we give to appellant the benefit of the doubt, and have very carefully examined all of the instructions given and refused, as, also, the arguments of counsel in relation thereto. The theory of appellant's counsel is, that the railway company was only bound to exercise ordinary care in the construction and maintenance of the bridge, and that the jury should have been so instructed; and, further, that if appellee had an opportunity, by the exercise of care, to discover that the bridge was too low to pass under with safety, and remained in the service of the company, he must be held to have voluntarily assumed the risk, and thereby waived all right of action for damages.

Complaint is made that some of the instructions given at the request of appellee, and upon the court's own motion, do not come up to the standard thus fixed by appellant's counsel, in that they omit the element of ordinary care on the part of appellant in the construction and maintenance of the bridge, and put the case to the jury regardless of the assumption of risk on the part of appellee.

It would be a tedious and, we think, unprofitable task to set out all of the numerous instructions thus objected to, and to extend this opinion in meeting, specifically, the ob-

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jections urged. Some of the instructions are somewhat confused, in that the jury were instructed in relation to matters not in issue either by the pleadings or the proof, but we think that the extraneous matters referred to could in no way have misled the jury to the prejudice of appellant. Some of the instructions given were, perhaps, not as full as they might have been, but it has often been held by this court that it is unnecessary, as it is impracticable, to embody all of the law of the case in one instruction, and that where a rule of law applicable to the case is given in one instruction it is not necessary to repeat it in another; and further, that if an instruction contains no erroneous proposition of law as applied to the case, and either party thinks that it is faulty because not full enough, his remedy is to submit additional instructions. *Louisville, etc., R. W. Co. v. Jones*, 108 Ind. 551 (570), and cases there cited; *Board, etc., v. Legg*, 110 Ind. 479 (485), and cases there cited; *Wilson v. Trafalgar, etc., G. R. Co.*, 93 Ind. 287 (291).

And so, it has been many times held that all of the instructions given must be considered together, and that, if thus considered, the law was correctly stated in such a manner as to be intelligible, and not confusing to the jury, the judgment will not be reversed by reason of inaccurate statements in any particular instruction. *Louisville, etc., R. W. Co. v. Jones, supra*, and cases there cited; *Cline v. Lindsey*, 110 Ind. 337, and cases there cited; *Rauck v. State*, 110 Ind. 384, and cases there cited; *Deig v. Morehead*, 110 Ind. 451, and cases there cited.

Leaving out of consideration for the present the seventh instruction given at the request of appellee, the others given at his request, and upon the court's own motion, taken together, put the case to the jury substantially upon the theory contended for by appellant's counsel. And in the ten instructions given at the request of appellant's counsel, their theory was pushed to the utmost limit, and, in some instances,

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beyond what reason and the correct rules of the law will justify.

It appears in this case that the brakes which appellee was required to set were on the tops of the cars. It was necessary for him, in getting to them, to pass over the tops of the cars. There are cases which hold that, in such a case, railway companies are not bound to erect the overhead bridges constructed by them, of such a height that brakemen can stand or walk erect upon the tops of the cars without coming in collision with them.

As applied to this case, especially, we can not approve of those rulings. Here, the bridge was but four feet and nine inches above the tops of the cars; the brakes were on the tops of the cars, and, to get to them, the brakemen were required to pass over the tops of the cars, not only in the daytime, but also in the night-time, and often, doubtless, as in this case, when the night was dark, rainy and foggy, and when it would be almost if not quite impossible for them to know of the proximity of such bridges when called to brakes upon moving trains, even if they had knowledge that such bridges were maintained.

To erect and maintain such bridges, under such circumstances, is negligence.

Further reflection has strengthened the conviction on our part, that this conclusion is fully sustained, both by reason and the better authority.

In addition to the authorities cited in the principal opinion, we cite the following: Shearman and Redfield Neg. (4th ed.), section 198, *et seq.*, and notes and cases there cited; Beach Contrib. Neg., section 134; *Chicago, etc., R. R. Co. v. Johnson*, 116 Ill. 206.

And where, as here, the facts are shown without any conflict in the evidence, the court may charge the jury that in the erection and maintenance of the bridge the railway company was guilty of negligence. *Board, etc., v. Legg*, 110 Ind. 479, and cases there cited.

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In the contract of hiring, an employee assumes all risks ordinarily and naturally incident to the service, but he does not assume the risk of injury from unusual hazards. To say the least, in this case appellee did not, by his contract of hiring, assume the risk of injury from the low bridge, unless he had knowledge of the hazard. The danger from such a bridge is not a hazard ordinarily and naturally connected with the service. It is not shown that he was informed of the danger, nor that he had knowledge of it when he engaged in the service.

As to his duty to exercise care for his own safety, both in discovering the danger and in avoiding the injury, the jury were fully instructed, and, as we have said, and without being more specific, the rule was pushed beyond what reason and the law will sanction.

It is not easy to determine whether the seventh instruction given at the request of appellee was intended to place appellee's right to recover upon the doctrine of comparative negligence, or upon the ground of wilfulness on the part of appellant, in which case negligence on the part of appellee would not defeat his right to recover. Upon either construction, the instruction was erroneous. In the first place, the doctrine of comparative negligence, as held by the Illinois court, and as applied to a case like this, has no place in the rulings of this court; and, in the second place, appellant is not charged with wilfulness in the complaint.

The error, however, must be regarded as a harmless one, as the jury found, in answer to interrogatories, that appellee was not guilty of negligence. It is, therefore, apparent that the verdict was not based upon the greater negligence of appellant and the lesser negligence of appellee; nor upon the theory that, although appellee was guilty of negligence, he could yet recover by reason of wilfulness on the part of appellant. See *Worley v. Moore*, 97 Ind. 15; *Woolery v. Louisville, etc., R. W. Co.*, 107 Ind. 381.

As to the eleventh instruction, asked by appellant and re-

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fused by the court, it is sufficient to say that it does not state the law correctly, and that if it did, the error in refusing it would be a harmless error, as the second instruction so asked and given embodied the substance of it. *Stephenson v. State*, 110 Ind. 358; *National Benefit Ass'n v. Grauman*, 107 Ind. 288.

And so of instructions 12 and 12½ asked by appellant and refused by the court; without deciding whether, as asked, they stated the law correctly, it is sufficient to say that the substance of them was embodied in other instructions given.

From what is here said it must not be understood that we intend to endorse in full the theory upon which appellant's counsel have argued the alleged errors in the giving of instructions as above stated, and as applied to a case like this.

After a careful consideration of all of the questions discussed by counsel, we are satisfied that the record presents no error for which the judgment should be reversed.

The petition for a rehearing is, therefore, overruled.

Filed June 20, 1888.

No. 13,003.

THE INDIANA, BLOOMINGTON AND WESTERN RAILWAY
COMPANY ET AL. v. BARNHART.

SPECIAL VERDICT.—*Requisites of.*—*Practice.*—In a special verdict, all facts essential to a recovery must be found, to entitle the party having the burden of the issue to a judgment. Facts only are to be found, and conclusions of law contained therein must be disregarded.

LICENSE.—*Acquiescence.*—*Assumption of Risks by Licensee.*—Where a person has a license to go upon the grounds or the enclosure of another, or uses such grounds with the mere acquiescence of the owner, he takes the

115	399
119	381
121	509
115	399
134	278
136	442
115	399
140	278
141	544
142	485
143	700
115	399
144	607
146	561
115	399
148	464
115	399
154	58
115	399
163	256
115	399
164	480
115	399
167	335
168	

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premises as he finds them, and accepts whatever perils he thereby incurs.

NEGLIGENCE.—*Liability of Owner of Land for Breach of Duty.*—*Implied Invitation.*—Where the owner or occupant of lands, by enticement, allurement or inducement, either express or implied, causes another to come upon such lands, he assumes the obligation of providing for the safety and protection of the person so coming, and becomes liable for any breach of duty in that respect which causes injury to such person, in case such enticement, allurement or inducement amounts to an express or implied invitation, and an implied invitation may be inferred from some act or line of conduct, or from some designation or dedication.

SAME.—*Statutory Obligation.*—*Liability for Violation of.*—*Railroad.*—As a general rule, where an obligation is imposed by a statute, it is negligence *per se* to disregard the obligation thus imposed, and if injury is thereby inflicted, the party disregarding the statute is liable. This rule has peculiar application to the management of railroads and railroad trains.

SAME.—*Statute Construed.*—*Railroad Crossings.*—*Liability of Companies for Failure to Repair.*—Under the provisions of sections 3904 and 3905, R. S. 1881, all railroad companies interested in railroad crossings are required to co-operate in maintaining and keeping such crossings in repair, and are jointly liable for an injury resulting from a neglect to observe such statute.

From the Marion Superior Court.

A. C. Harris, W. H. Calkins, C. W. Fairbanks, B. Harrison, W. H. H. Miller and J. B. Elam, for appellants.

H. N. Spaan and S. M. Bruce, for appellee.

NIBLACK, J.—This was, when it was commenced, an action against the Indiana, Bloomington and Western Railway Company, the Wabash, St. Louis and Pacific Railway Company, Kingan & Company, Limited, the White River Railroad Company and the Kingan Railroad Company, for an alleged personal injury, but before the cause was submitted to a jury, it was dismissed as to all except the Indiana, Bloomington and Western Railway Company and the White River Railroad Company.

At the request of the plaintiff, the jury were, at special term, directed to return a *special* verdict, which they did accordingly, and which was as follows: .

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“ 1. That the Indiana, Bloomington and Western Railway Company is a corporation which, on and about the 12th day of April, 1883, was the lessee and had control of the line of railway built by the Indianapolis, Decatur and Springfield Railway Company, and extending from a place where said line of railway crosses the White river in the western portion of the city of Indianapolis, in an easterly and southeasterly direction, past and just south of a pork house owned by Kingan & Company, Limited. That said Indiana, Bloomington and Western Railway Company came into possession of said line of railway, as such lessee, on and about the 1st of January, 1882, and has controlled the same ever since.

“ 2. That the White River Railroad Company is a corporation owning and controlling two lines of railway, which, commencing in the private grounds of Kingan & Company, Limited, within said city of Indianapolis, run almost parallel with each other in a south and southeasterly direction, in their course were crossed by the before mentioned line of railway leased and controlled by the Indiana, Bloomington and Western Railway Company; said place of crossing being situated a little east of south of the place where said parallel tracks run through the gate at the south of the main building of said pork house owned by Kingan & Company, Limited.

“ 3. That the easternmost of said lines of railway belonging to the White River Railroad Company is commonly known as the salt track or switch; that the westernmost of said tracks or switches is commonly known as the house track.

“ 4. That the place where said salt and house tracks cross and intersect the line of railway leased and controlled by the Indiana, Bloomington and Western Railway Company, is about thirty-five or forty feet south of the gate at the south entrance to the grounds of Kingan & Company, Limited.

“ 5. That the crossing at the point where said salt track

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intersects the line of the Indiana, Bloomington and Western Railway Company is what is known as an Elliott crossing; and said lines of railway do not intersect each other at right angles, but at such an angle so that the north rail of the Indiana, Bloomington and Western Railway Company's line of railway, and the west rail of the salt track make an angle where they come together of twenty-five degrees and forty-one minutes.

"6. That the rails of said crossing, including the guard-rails, are straight, and said salt track is straight north of said crossing for a distance of about ten feet, and said salt track is straight south of said crossing for a distance of from ten to fourteen feet.

"7. That said salt track, commencing about ten feet north of said crossing, curves to the east, and said salt track, commencing from ten to fourteen feet south of said crossing, curves to the east and north. That the curve south of said crossing is greater and sharper than the curve north of said crossing.

"8. That said railway crossing is composed of the main rails of said two lines of railway, and guard-rails running parallel thereto and about two and one-half inches from the said main rails. That said guard-rails extend all the distance between the main rails of the Indiana, Bloomington and Western Railway Company's track in a northwesterly and southeasterly direction, and also for a distance of from ten to fourteen feet south of said crossing and for a distance of from ten to fourteen feet north of said crossing.

"9. That the point where the main and guard-rails of said railway companies crossed each other is commonly known as the point of bisection and sometimes as the throat of the frog. That there were four of such points of bisection in this crossing, and were designated as the southwest, the northwest, northeast and the southeast frogs or points of bisection, respectively.

"10. That at these points of bisection the main rails of

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said two lines of railway were fastened and bolted together through fish plates, angle irons, and filling between the main and guard-rails.

“11. That the southwest and the northwest points of bisection were loose, some of the bolts which held them together being gone or broken, and said points of bisection having, when cars passed over them, an up and down motion; that the east guard-rail of the salt track was also loose.

“12. That the southwest and the northwest points of bisection, and the east guard-rail before mentioned, were so loose and insecure as to be unsafe for the use to which said crossing was put.

“13. That at the northwest and southwest points of bisection the main and guard-rails of both the defendants in this case came together, and the rails and guard-rails at said points belonging to and controlled by said defendants, respectively, were loose and in an unsafe condition as aforesaid.

“14. That, on the 12th day of April, 1883, both of said defendants, by the exercise of reasonable diligence, could have known of the loose and unsafe condition of the railway crossing aforesaid.

“15. That, on the 12th day of April, 1883, the plaintiff herein was in the employ of the Cincinnati, Indianapolis, St. Louis and Chicago Railroad Company, in the capacity of a locomotive engineer; that upon said day he was in charge of a switch engine, numbered 51; that on or about 5 o'clock in the afternoon of said day he was, with his engine, pulling out of the private grounds of Kingan & Company, Limited, a 'cut' of cars upon the house track aforesaid, and when he had reached, with his engine, a point about four feet north of the track of the Indiana, Bloomington and Western Railway Company, his said engine was run into by a car being backed up upon the salt track aforesaid, by the servants of the Wabash, St. Louis and Pacific Railway Company.

“16. That plaintiff's engine at the time it was struck was moving southeastwardly at the rate of three or four miles

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per hour, and the plaintiff was in his proper place upon the right side of his engine, attending to the machinery of said engine; that when his said engine was struck as aforesaid, the plaintiff received great injury, and when he received the same he was in nowise negligent, but was in a place where he had a right to be, and doing what he had a right to do, and he was exercising ordinary care and prudence.

“17. That said plaintiff was with his engine upon said house track at the time he was injured, with the implied consent of the White River Railroad Company, and was proceeding across the track of the Indiana, Bloomington and Western Railway Company upon a signal given to do so by an employee of said last named company, whose duty it was to give such signal.

“18. That the house and salt tracks aforesaid were used by the various railway companies centering in the city of Indianapolis, including the Wabash, St. Louis and Pacific Railway Company, the Indiana, Bloomington and Western Railway Company, and the Cincinnati, Indianapolis, St. Louis and Chicago Railway Company, for the purpose of switching and hauling freight over the same, such as coal, salt, meat, etc., to and from Kingan & Company's, Limited, pork-house, with the implied consent of the White River Railroad Company.

“19. That, upon said 12th day of April, 1883, the servants of the Wabash, St. Louis and Pacific Railway Company were backing up a cut of cars loaded with salt upon the salt track aforesaid; that the hindmost of said cars was loaded with salt, and when it reached the railway crossing aforesaid, said car left the rails of the salt track and ran into the engine under the charge of the plaintiff herein.

“20. That said car left the salt track aforesaid at the northwest bisection of the said railway crossing aforesaid, and it left said track of the defendant because of the loose and unsafe condition of said railway crossing.

“21. That the defendants herein caused, as aforesaid, the

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injuries of which plaintiff complains in this case, by their carelessness and negligence in not keeping the railway crossing aforesaid in ordinary safe condition, but allowed the same to become loose and out of repair.

“ 22. That the plaintiff was somewhat acquainted with the crossing at which said car left the track, and knew before said car ran off that said crossing had been allowed to get out of repair by the defendants, and he also knew that said crossing was unsafe for the use to which the same was put.

“ 23. We further find that the Wabash cut, at the time it was about to pass over said crossing, was running at a rate of speed of from four to six miles an hour, and that this speed, combined with the unsafe condition of said crossing, as aforesaid, caused said car to leave said crossing.

“ 24. We further find that said Wabash cut came onto said crossing without having received a signal from the Indiana, Bloomington and Western watchman to come across said Indiana, Bloomington and Western Railway Company's track.

“ 25. That when said car was pushed against the plaintiff's engine it knocked him to the ground and injured him so that ever since he has been unable to do any manual labor; that before the said 12th day of April the plaintiff was a strong, healthy, active man, at that time thirty-nine years of age; that he is permanently injured, and will probably be always disabled so that he can not carry on his usual calling of locomotive engineer, or any other calling that requires physical strength and activity.

“ 26. If, upon these facts, the law is with the plaintiff, then we find for the plaintiff against the defendants, the White River Railroad Company and the Indiana, Bloomington and Western Railway Company, and assess his damages at eight thousand dollars.

“ 27. And if the law is with the defendants, then we find for the defendants.”

When the verdict was returned, each one of the defendants moved for a *venire de novo*, but their motions were both

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overruled. Each next moved for a new trial, which was also refused as to both. Each thereupon moved for judgment in its favor upon the special verdict, and both of these motions were likewise denied. Judgment was then rendered in favor of the plaintiff for \$8,000 in damages, and that judgment was affirmed at general term.

No such argument is submitted, either in support of the motions for a *venire de novo*, or for a new trial, as is necessary to raise a question for decision in this court. We have, consequently, not considered whether any of those motions ought to have been sustained. But the questions arising, or sought to be raised, upon the matters contained in the special verdict have been ably and exhaustively argued, and are of a character to demand, as they have received, our most careful consideration.

It is contended on the one side, and fully admitted on the other, that facts only are to be found by a special verdict, and that all the facts essential to a recovery must be found to entitle the party having the burden of the issue to a judgment; also, that mere conclusions of law contained in a special verdict are to be disregarded. Such is undoubtedly the law as applicable to a special verdict. *Vinton v. Baldwin*, 95 Ind. 433; *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *Conner v. Citizens Street R. W. Co.*, 105 Ind. 62 (55 Am. R. 177); *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; 2 Tidd Practice, 897.

On behalf of the railroad companies, it is claimed that subdivision No. 14, the last half of subdivision No. 16, the first part of subdivision No. 17, the concluding words of subdivision No. 18, and the whole of subdivision No. 21, of the special verdict, contain mere conclusions of law which, under the rules announced as above, can not be taken into consideration in determining the sufficiency of the facts as found to sustain the judgment appealed from in this cause, and that, with these mere conclusions of law eliminated, the

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special verdict was insufficient to entitle Barnhart to have judgment upon it.

The claim thus made, as to what were mere conclusions of law, is, as we believe, well made as to all the enumerated parts of the special verdict except subdivision No. 21, which gave the facts from which the conclusion stated was drawn.

In support of the further claim that the facts as found by the jury were not sufficient to authorize a judgment against either one of the railroads companies, several propositions are urged:

First. That neither company owed any duty to Barnhart, he having been only on one of the tracks of the White River Railroad Company as a licensee, merely for his own convenience, and hence not as a matter of right, upon the invitation of either company.

Secondly. That there was nothing showing that either one of the railroad companies had notice that the crossings were in a bad condition, and that, for that reason, no negligence could be imputed to either company in permitting such crossings to be out of repair at the time of the injury.

Thirdly. That Barnhart was guilty of contributory negligence in the matters which materially led to his injury.

Some of the facts substantially found by the jury are not as clearly and specifically stated, perhaps, as they might have been, but when all that is embraced in the special verdict is carefully considered, we find no difficulty in ascertaining the material circumstances which led to and attended the injury sustained by Barnhart. While nothing can be intended to supply any defect in a special verdict, it is still the duty of the court to take into consideration all that may be plainly and reasonably inferred from the facts that have been found, when declaring the law upon such facts.

It is true, as contended, that the owner of premises is under no legal duty to keep them in good repair for the accommodation of persons who go upon them for their own convenience merely.

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Where a person has a license to go upon the grounds or the enclosure of another, he takes the premises as he finds them, and accepts whatever perils he incurs in the use of such license. But when the owner or occupant, by enticement, allurements or inducement, whether express or implied, causes another to come upon his lands, he then assumes the obligation of providing for the safety and protection of the person so coming, and for any breach of duty in that respect such owner or occupant becomes liable for any injury which may result to the person so caused to come onto his lands. The enticement, allurements or inducement, as the case may be, must be the equivalent of an express or implied invitation. Mere acquiescence in the use of one's lands by another is not sufficient. Such an implied invitation may be inferred from some act or line of conduct, or from some designation or dedication.

This general doctrine was affirmed in the case of *Evansville, etc., R. R. Co. v. Griffin*, 100 Ind. 221, and is well supported by a long line of authorities. *Sweeny v. Old Colony, etc., R. R. Co.*, 10 Allen, 368; *Smith v. London and St. Katharine Docks Co.*, L. R. 3 C. P. 326; *Carleton v. Franconia Iron and Steel Co.*, 99 Mass. 216; *Toledo, etc., R. W. Co. v. Grush*, 67 Ill. 262; *Doss v. Missouri, etc., R. R. Co.*, 59 Mo. 27 (21 Am. R. 371); *Elliott v. Pray*, 10 Allen, 378; *Stratton v. Staples*, 59 Maine, 94; *Railroad Co. v. Hanning*, 15 Wall. 649; *Bennett v. Railroad Co.*, 102 U. S. 577; *Hayes v. Michigan Cen. R. R. Co.*, 18 Rep. 193. See *Lary v. Cleveland, etc., R. R. Co.*, 78 Ind. 323; *Pittsburgh, etc., R. W. Co. v. Bingham*, 29 Ohio St. 364; *Jeffersonville, etc., R. R. Co. v. Goldsmith*, 47 Ind. 43; *Hargreaves v. Deacon*, 25 Mich. 1; *Nicholson v. Erie R. W. Co.*, 41 N. Y. 525; *Durham v. Musselman*, 2 Blackf. 96; *Hounsell v. Smyth*, 97 E. C. L. 731; *Gillis v. Pennsylvania R. R. Co.*, 59 Pa. St. 129; *Southcote v. Stanley*, 1 H. & N. 246; *Bolch v. Smith*, 7 H. & N. 736; *Lygo v. Newbold*, 24 L. & Eq. 507; *Burdick v. Cheadle*, 26

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Ohio St. 393; *Hardcastle v. South Yorkshire R. W. Co.*, 4 H. & N. 67.

The reasonable inference from the pertinent facts found in this cause is, that the two lines of railroad owned by the White River Railroad Company were designed to be, and were in fact, used as mere switches for the purpose of connecting the pork-house of Kingan & Company, Limited, with the various lines of railroad coming into the city of Indianapolis, and of enabling the companies operating such last named railroad lines to haul freight of various kinds over such switch lines to and from such pork-house. The purposes for which these switch lines were seemingly designed, and for which they were permitted to be used, amounted, for the time at least, to a practical dedication of such switch lines to the use of the various connecting railroad lines in the transportation of freight and cars to and from the pork-house of Kingan & Company, Limited. Barnhart was, therefore, at the place at which he was injured upon the implied invitation of the White River Railroad Company. He was also proceeding on his way upon a signal given by, and hence at the express invitation of, the Indiana, Bloomington and Western Railway Company.

Under such circumstances, both companies were under an obligation to provide for his safety and protection while passing over their tracks. As affecting the claim that there was nothing shown from which negligence could be imputed to either one of the railroad companies, it may be said that the general rule is, that where an obligation is imposed by a statute, it is negligence *per se* to disregard the obligation thus imposed, and, if injury is thereby inflicted, the party disregarding the statute is liable. To this general rule there are some exceptions, but there is nothing in the nature of the present case to make it one of the exceptions.

The rule, as stated, has a peculiar application to the management of railroads and railroad trains. Thompson Negligence, pp. 419, 558, 565, 1232, and authorities cited; *Wes-*

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ley City Coal Co. v. Healer, 84 Ill. 126; *Pennsylvania Co. v. Hensil*, 70 Ind. 569 (36 Am. R. 188); *Chicago, etc., R. R. Co. v. Boggs*, 101 Ind. 522 (51 Am. R. 761).

Sections 3904 and 3905, R. S. 1881, which have been in force since March 7th, 1873, are as follows:

“Section 3904. Where it becomes necessary for the track of one railroad company to cross the track of another railroad company, the company owning the road last constructed at such crossing shall, unless otherwise agreed to between such companies, be at the exclusive expense of constructing such crossing in a manner to be convenient and safe for both companies.

“Section 3905. Whenever such railroad crossing is constructed in the manner provided for in the preceding section, it shall be the duty of each company, respectively, to maintain and keep in repair its own track, so as at all times to provide a ready, safe and convenient crossing for all locomotives or trains passing on either road at such point.”

The act of March 7th, 1873, which embraced these sections, contained also the following emergency clause:

“Whereas there is no law now in force upon the subject of keeping railroad crossings in repair, and providing for the expense thereof, an emergency is declared to exist for the immediate taking effect of this act. It shall, therefore, be in force from and after its passage.” Acts of 1873, p. 186.

This emergency clause plainly expressed the intention that the provisions of the act on the subject of keeping railroad crossings in repair should apply to all railroad crossings which thereafter might be maintained within the State, and that all railroad companies interested in crossings should be required to co-operate in maintaining and keeping such crossings in proper repair.

As was shown by the eleventh, twelfth and thirteenth subdivisions of the special verdict, two points of bisection at the crossing made by the salt track belonging to the White River Railroad Company, and the line of the Indiana,

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Bloomington and Western Railway Company, were badly out of repair at the time of the collision which injured Barnhart. These bisections had in fact lost their fastenings and had been permitted to become loose, insecure and unsafe. This condition of things was allowed to exist at the peril of the railroad companies owning the tracks, and, being in violation of the provisions of a statute, was, in the abstract sense, negligence *per se* on the part of such companies. As was further shown by the twentieth and twenty-first subdivisions of the special verdict, it was this loose, insecure and unsafe condition of one of the bisections and consequent defective state of the crossing which caused the cars of the Wabash, St. Louis and Pacific Railway Company to leave the track and to collide with the engine in charge of Barnhart. Since, for the reason given, both of the railroad companies now before us owed to Barnhart the duty of providing for his safety while he was engaged upon their tracks in the service of his company, the subdivisions of the special verdict, lastly above referred to, established a cause of action against these companies, unless Barnhart was guilty of contributory negligence.

As has been seen, the twenty-second subdivision of the special verdict found that Barnhart was somewhat acquainted with the crossing at which the car, which injured him, left the salt track, and that he knew before the car ran off that the crossing at that point had been allowed to get out of repair by the companies to which it belonged; also, that he knew that the crossing was unsafe for the purpose for which it was used. From this it is argued that Barnhart was guilty of contributory negligence in going upon either one of the tracks of the White River Railroad Company; that in doing so he voluntarily assumed the risk of a danger which he knew existed, and thus forfeited all right to compensation for any injury which might result to him from his going on to either one of such tracks.

This argument leaves entirely out of view the fact that no

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defect was shown to exist either in the "house track," which Barnhart was using, or in the crossing over which he was endeavoring to pass when he was hurt. For aught that was made to appear, that track and that crossing were at the time both in good condition, and we must assume that they were. Nor was any thing found indicating that there was any direct connection between the two White river railroad tracks, or that the use of one involved any responsibility for the use or misuse of the other.

Considered in connection with the business which Barnhart had in hand, it was wholly immaterial to him whether the crossing on the "salt track" was in good or in bad condition. He had not been, and was not aiming to go, upon that track at the time of the collision. His knowledge, therefore, of the unsafe condition of the "salt track" was a matter entirely collateral to, and wholly disconnected with, the work in which he was engaged on the "house track." The contingency of a car breaking away from the "salt track" and running over on to the "house track" was one which could not have been reasonably anticipated, and was hence not an occurrence against which Barnhart was required to be on his guard.

As we construe the relative situation of affairs at the time Barnhart was thrown from his engine, he was not guilty of contributory negligence.

The judgment is affirmed, with costs.

Filed March 20, 1888; petition for a rehearing overruled July 10, 1888.

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No. 12,886.

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115	413
117	592
121	254
115	413
125	188
127	499

DEED.—*Real Estate.*—*Conveyance.*—*Mortgage.*—*Presumption.*—The presumption is that an instrument is what it purports to be; and a deed, absolute on its face, will operate as a conveyance of the fee, unless the evidence proves it to be a mortgage.

SAME.—A deed can not be regarded as a mortgage where there was in fact a sale of the property for an agreed price, which was paid in full by the grantees, and where the property was in no possible contingency to re-vest in the grantors.

SAME.—It is not sufficient to transform a deed into a mortgage to prove that at the time it was made the parties agreed that, in the event the property should be sold for more than its agreed price, the grantors should receive such increased price.

From the Vigo Circuit Court.

C. F. McNutt, I. N. Pierce, S. C. Davis, S. B. Davis and T. W. Harper, for appellant.

J. G. Williams, for appellees.

ELLIOTT, J.—The appellant brought this suit to have a deed, absolute on its face, declared a mortgage, and to have it declared invalid as a mortgage, because executed by her to secure the debt of her husband.

The appellees filed a cross-complaint containing these material allegations: That Mary J. Rogers is and has been the wife of Newton J. Rogers for more than ten years; that Newton J. Rogers was the treasurer of Vigo county from 1877 to 1881, inclusive; that he was a defaulter in the sum of \$50,000; that the appellees were the sureties on his official bond; that, while he was indebted to the county, he bought the land in controversy and caused the title to be made to his wife, without any consideration moving from her; that he paid for the real estate with his own money, and with the money of the county; that, at the close of his term of office, he desired to apply the real estate to the payment of the sum

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due from him to the county; that, to effect this purpose, he and his wife conveyed it by a general warranty deed to the appellees; that the consideration agreed upon was ten thousand dollars, which was paid by the appellees to the county; that the amount paid by them was the full value of the land; that they are in good faith the owners of the land in fee simple; that Mary J. Rogers is unlawfully and without right claiming title to it, and unlawfully detains possession of it; that she falsely and fraudulently pretends and claims that the conveyance to these appellees is simply a mortgage, executed as the security for the debt of her husband, but that such claims and pretences are without foundation in fact, but serve to cast a cloud upon the title of the appellees. The prayer of the cross-complaint is, that the title of the appellees be quieted, and that Mary J. Rogers be required to surrender possession to them.

The appellant's counsel assume that the cross-complaint seeks to set aside the conveyance from Newton J. Rogers to Mary J. Rogers as fraudulent, but this assumption is entirely groundless. The cross-complaint does not proceed upon the theory attributed to it by counsel, but proceeds upon the theory that, by the deed executed to the appellees by the appellant and her husband, they became the owners in fee of the property, and that the appellant's claim is unfounded, although sufficient to cast a cloud upon their title. It is in fact a complaint to quiet title. As a complaint to quiet title it is unquestionably good. It shows that the appellees bought the land, that they paid, in good faith, full value for it, and that they received a warranty deed for it. The pleading makes an unusually strong case, for it shows that Mary J. Rogers was not at any time, in equity or good conscience, the owner of the land, but that it belonged to her husband. Independent, however, of this consideration, the cross-complaint is good, for it shows that the appellees are the owners in fee simple of the land, and as they are the owners they may maintain a suit to quiet title. *Indiana, etc., R. W. Co. v.*

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Allen, 113 Ind. 308; *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 581; *Dumont v. Dufore*, 27 Ind. 263.

The record presents no question upon the rulings in admitting and in excluding testimony, for the reason that the motion for a new trial simply states that the court erred in admitting incompetent evidence and in excluding competent evidence, "as set out and designated by the bill of exceptions," but the evidence is not specified, nor is the name of any witness given.

There is evidence sustaining the finding of the trial court. The deed is absolute on its face, and it must operate as a conveyance of the fee, unless it can be said that the evidence proved it to be a mortgage. The presumption is that the instrument is what it purports to be, a general warranty deed. 1 Jones Mortg., sections 282, 283; 3 Pomeroy Eq. Juris., section 1196.

Several witnesses testified positively that the appellees bought the land after having refused to accept a mortgage. This evidence certainly gives full support to the theory of the appellees that they acquired the title to the land in fee.

The fact that the parties agreed that the transaction should be a sale and not a mortgage is a very important one, although if it stood alone against evidence favoring the theory that the instrument was a mortgage, it might possibly not be absolutely controlling. *Baker v. Thrasher*, 4 Denio, 493; *Macaulay v. Porter*, 71 N. Y. 173.

But the fact does not stand alone, nor is it opposed by circumstances of greater weight. It does not appear that the deed was made to secure a debt, but, on the contrary, it appears that the grantees paid to one of the grantors money to be used by him in paying a debt due from him to a third person. It can, of course, make no difference for what purpose the grantor obtained the money, provided the grantees became the purchasers of the land. If, in other words, they agreed to buy, and did buy, the property, then it is not material for what purpose the grantor wanted the money, nor

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to what purpose he applied it. He did, in fact, want the money which the appellees paid for the property for his own purpose, and did apply it to the payment of his own debt.

There was no debt existing at the time the contract was made, owing from the grantors to the grantees, nor was any debt, then created, so that the instrument was not executed to secure a subsisting debt. It is true the grantees were sureties on the bond of one of the grantors, but the debt was his, and was due his creditor. If there had been a subsisting debt, the question would be more difficult; but there was no debt to the grantees, and the money was paid by them when the instrument was executed.

There is still another reason why the instrument can not be regarded as a mortgage, and that is, that upon no possible contingency was the property to revert in the grantors. *Baker v. Thrasher, supra*; *Macaulay v. Porter, supra*.

Nor was there any sum for which either of the grantors would be liable to the grantees after the purchase-price paid by the latter had been exhausted. There was, in fact, a sale of the property for an agreed price, and this price was paid in full by the grantees, so that the transaction was what it professes to be; a sale, and not a mortgage. *Slowey v. McMurray*, 27 Mo. 113; *Robinson v. Cropsey*, 2 Ed. Ch. 138; *Slutz v. Desenberg*, 28 Ohio St. 371.

It is not sufficient to transform a deed into a mortgage to prove that at the time it was made the parties agreed that, in the event that the property should be sold for more than the agreed price, the grantors should receive the increased price. *Hays v. Carr*, 83 Ind. 275; *Conway v. Alexander*, 7 Cranch, 218; *Cunningham v. Banta*, 2 Ind. 604; *Lee v. Kilburn*, 3 Gray, 594; *Glover v. Payn*, 19 Wend. 518; *Flagg v. Mann*, 14 Pick. 467.

Leaving entirely out of consideration the evidence tending to show that Newton J. Rogers, and not the appellant, was the owner of the property, we think it clear that the

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judgment was right, for there was an absolute sale, and not a mere pledge of the property as the security for a debt.

Judgment affirmed.

Filed July 10, 1888.

No. 14,290.

CUMMINS, TRUSTEE, EX REL. MAHAN, v. THE EVANSVILLE
AND TERRE HAUTE RAILROAD COMPANY.

115	417
140	277
115	417
149	278
115	417
158	191

HIGHWAY.—*Obstruction of.*—*Railroads.*—*Practice.*—*Mandate.*—*Statute Construed.*—The provisions of section 3903, R. S. 1881, confer upon a railroad company, duly incorporated, authority to construct its railroad track over and across a public highway; but such company is required to restore such highway to its former state, in a sufficient manner not to unnecessarily impair its usefulness, and the performance of such duty may be compelled by mandate.

SAME.—*Statute Construed.*—The provisions of section 23 of "An act concerning highways," passed March 2d, 1883 (Acts 1883, p. 62), do not apply to a case where a railroad company, having constructed a track upon a public highway, fails to restore such highway to its former condition of usefulness, and in such case an action for the statutory penalty provided for in such section will not lie.

From the Sullivan Circuit Court.

W. C. Hultz, O. B. Harris and J. S. Bays, for appellant.

J. E. Iglehart and E. Taylor, for appellee.

HOWK, J.—This suit was commenced by appellant, Cummins, trustee of Jackson township, of Sullivan county, upon the relation of William H. Mahan, supervisor of road district No. 2 in said township, as plaintiff, against the appellee as defendant, before a justice of the peace of said county.

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From the justice's judgment the cause was appealed to the court below. There defendant's demurrer to the complaint herein, for the alleged insufficiency of the facts therein to constitute a cause of action, was sustained. Plaintiff declined to amend his complaint or plead further, and thereupon the court adjudged that he take nothing by his suit, and that defendant recover of him its costs expended herein.

In this court error is assigned by plaintiff upon the sustaining of the demurrer to his complaint herein.

In his complaint plaintiff alleged that the defendant, on the 31st day of August, 1886, and on each and every succeeding day until the 9th day of October, 1886, unnecessarily and to the hindrance of passengers, obstructed a certain public highway in road district No. 2 of Jackson township, in Sullivan county, described as follows, to wit: (Description omitted), by then and there, and all of said time, building, constructing and maintaining a railroad track in, upon, along, across and over said highway, and by then and there, and all of said time, running and operating trains of cars, engines and locomotives upon and over said line of railroad track in such a manner as to then and there, and all of said time, interfere with the free use of said highway, and not to afford security for life and property; that the defendant then and there, and all of said time, utterly failed in every particular to restore said highway, so intersected, to its former state, and failed in every particular to restore said highway, so intersected, in a sufficient manner so as not to interfere with or impair its usefulness, or injure its franchises. Wherefore plaintiff demanded judgment for \$175, for an attorney's fee of five dollars for his attorney, and for all proper relief.

In the absence of averment to the contrary, it must be assumed, we think, that appellee was incorporated as a railroad company, under the provisions of the general laws of this State providing for the incorporation of such companies, and was and is possessed of the general and special powers which

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those laws expressly confer upon such corporations, "subject to the liabilities and restrictions" expressed therein.

Among the powers so conferred, in the *fifth* clause of section 3903, R. S. 1881, in force since May 6th, 1853, and still in force, it was and is provided that such a corporation shall possess the power "to construct its road upon or across any * * * * * highway, * * * so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the * * * highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness," etc. Under this clause of the statute, we are of opinion that appellee was fully authorized to build, construct and maintain its railroad track over and across the highway described in the complaint herein, and to operate its line of track by running engines and trains of cars thereon. But it became and was appellee's duty, under the statute, to restore such highway to its former state, or in a sufficient manner not to unnecessarily impair its usefulness. For the non-performance of this duty, the general laws of this State for the incorporation of railroad companies provide no penalty and prescribe no remedy. It has been held by this court, however, and correctly so, we think, that the performance of such duty by the railroad company may be compelled by mandate. *Indianapolis, etc., R. R. Co. v. State, ex rel.*, 37 Ind. 489; *State, ex rel., v. Demaree*, 80 Ind. 519; *Clawson v. Chicago, etc., R. W. Co.*, 95 Ind. 152.

On the 2d day of March, 1883, an act of the General Assembly of this State was approved and became a law, entitled "An act concerning highways and supervisors thereof." In section 23 of such act, so far as it can be claimed to apply to the case under consideration, it is provided as follows: "Any person who shall * * * * * unnecessarily, and to the hindrance of passengers, obstruct any highway, * * * for

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every such offence such person shall forfeit the sum of five dollars, to be recovered before a justice of the peace of the county, in the name of the trustee, by the supervisor of the district, and, in case of such obstruction, for every day the same is continued, such sum shall be recovered, and, in all such cases, such supervisor, within three days after receiving information of any such forfeiture, shall commence such suit, and the sum recovered thereon shall be paid to the trustee of the township for the benefit of the highways of such districts: *Provided*, That in such actions the justice of the peace shall tax, as costs, in all such cases where judgments are rendered, the sum of five dollars "as attorney's fees for plaintiff's attorney."

It is manifest, we think, from the averments of the complaint herein, the substance of which we have heretofore given almost in the language of the pleader, that it was drawn upon the theory that appellee was liable to the penalty or forfeiture prescribed in the section quoted of the above entitled act of March 2d, 1883, not for its obstruction of the highway, but for the non-performance of its statutory duty to restore such highway to its former state, or in a sufficient manner not to unnecessarily impair its usefulness. We are of opinion that this theory is radically wrong, and can not be sustained.

Appellee had the right, under the law of its incorporation, to obstruct the highway by building, constructing and maintaining its railroad track on, over and across the same, and to operate its trains of cars thereon, as charged in the complaint herein. It was appellee's duty, under its charter, to restore such highway to its former state, or in a sufficient manner not to unnecessarily impair its usefulness. The complaint avers, and the demurrer admits, that appellee failed to perform its statutory duty in the premises; but neither the general laws for the incorporation of railroad companies, nor the aforesaid act of March 2d, 1883, have prescribed any penalty or forfeiture for such failure to perform such duty.

 Reynolds v. The State, ex rel. Cooper.

Our conclusion is, that the court below committed no error in sustaining the demurrer to the complaint herein.

The judgment is affirmed, with costs.

Filed Sept. 20, 1888.

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No. 12,722.

REYNOLDS v. THE STATE, EX REL. COOPER.

PRACTICE.—*Civil Action.*—*Preponderance of Evidence.*—In civil actions a preponderance of the evidence only is necessary to establish the affirmative of an issue, whatever the nature of that issue may be.

BASTARDY.—*Rules of Practice.*—*Civil Action.*—A prosecution for bastardy is a civil action, and the rules of practice applicable to other civil actions are applicable to it, except when a different or special procedure is provided by the statute.

From the LaPorte Circuit Court.

D. J. Wile and *F. E. Osborn*, for appellant.

L. A. Cole, for appellee.

ZOLLARS, J.—In this action by the State, upon the relation of Jennie Cooper, appellant was adjudged to be the father of her illegitimate child.

The only point made here is, that the finding and judgment by the court below are not sustained by sufficient evidence.

A part of the argument is, that the proceeding partakes so much of the nature of a criminal proceeding that no judgment should be rendered against a defendant unless the evidence shows beyond a reasonable doubt that he is the father of the child. That argument is not well founded.

It is settled by a long line of our cases, that, under the code,

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a prosecution for bastardy is a civil action, and that the rules of practice applicable to other civil actions are applicable to it, except where a different and special procedure is provided. *Galvin v. State, ex rel.*, 56 Ind. 51; *State, ex rel., v. Brown*, 44 Ind. 329; *Hawley v. State, ex rel.*, 69 Ind. 98; *State, ex rel., v. Evans*, 19 Ind. 92; *Stone v. State, ex rel.*, 33 Ind. 538; *Saint v. State, ex rel.*, 68 Ind. 128; *De Priest v. State, ex rel.*, 68 Ind. 569; *Maloney v. Newton*, 85 Ind. 565 (569); *Powell v. State, ex rel.*, 96 Ind. 108.

These cases are in harmony with the letter and spirit of the general provisions of the code, and especially with sections 980 and 983, R. S. 1881, which are as follows :

Section 980. "The prosecution (for bastardy) shall be in the name of the State of Indiana, on the relation of the prosecuting witness ; but the rules of evidence shall be the same as in civil cases," etc.

Section 983. "The trial and continuance thereof of such prosecution, both before the justice and in the circuit court, shall, in all respects not herein otherwise provided for, be governed by the law regulating civil suits."

The only reasonable conclusion to be drawn from these statutes, the general provisions of the code, and the cases cited, and others that might be cited, is, that, in a prosecution for bastardy, a preponderance of the evidence is all that is necessary to establish the case against the defendant.

In such a case, as in other civil actions, this court will not reverse the judgment if there is evidence fairly tending to support it. That rule has been uniformly applied. *Dibble v. State, ex rel.*, 48 Ind. 470 ; *Askren v. State, ex rel.*, 51 Ind. 592; *De Priest v. State, ex rel., supra.*

If any other authority were necessary it will be found in the late case of *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59, where, after a thorough examination of the whole question, and a review of numerous cases and authorities, it was held that in all civil actions, a preponderance of the evidence

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only is necessary to establish the affirmative of an issue, whatever the nature of that issue may be.

We have examined the evidence as we find it in the record. It would not be profitable to set it out in full or in substance. The judgment can not be reversed upon the evidence. The testimony of the relatrix is corroborated, that of appellant is not. The judgment could not be reversed upon the evidence, if the rule contended for by counsel for appellant were the proper rule to apply in such cases. As we have already seen, in a case like this, a preponderance of the evidence is all that is necessary to justify the trial court in finding the affirmative of an issue. And in this court, as already stated, a judgment will not be reversed if there is evidence fairly tending to support it.

Judgment affirmed, with costs.

Filed Sept. 19, 1888.

No. 13,820.

GAYLORD ET AL. v. THE CITY OF LAFAYETTE ET AL.

TRUST.—*Voluntary Trust.*—*Consideration.*—*Irrevocability.*—A voluntary trust, resting upon a meritorious consideration, and perfectly created, is irrevocable.

SAME.—*When Executed.*—*Definition.*—A trust is executed when it has been perfectly and explicitly declared in a writing duly signed, in which the terms and conditions upon which the legal title to the trust estate has been conveyed or is held, and the final intention of the creator of the trust in respect thereto, appear with such certainty that nothing remains to be done except that the trustee, without further act or appointment from such creator, carry into effect his declared intention; and in such case, though there was no original valuable consideration, the

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trust will be enforced in favor of one whose relation to the donor was such as to show a good or meritorious consideration.

SAME.—*When Executory and Incomplete.*—*Chancery Jurisdiction.*—A trust is incomplete and executory, and not within the jurisdiction of a court of chancery, when property has been conveyed upon a trust, the precise nature of which is imperfectly declared, or when the donor reserves the right to define or appoint the trust estate more particularly, although it may be apparent that the creator of the trust has, in a general way, manifested his ultimate purpose, at a time and in a manner to be determined, either by himself or the trustee, to bestow the property upon a person named.

SAME.—*Perfect or Imperfect Execution of, Question of Fact.*—*Rules for Determining.*—Whether a trust is perfectly executed or not is a question of fact, to be determined by the purposes and objects which the settlor had in view, as manifested in the writing and by the situation and relation of the parties and of the trust property; and in cases where the writing is indefinite or the language ambiguous, the practical interpretation given it by the parties themselves, in carrying out their purposes, is entitled to great, if not controlling weight.

MORTGAGE.—*Foreclosure.*—*Effect of.*—*Res Adjudicata.*—*Estoppel.*—A decree against a mortgagor in a foreclosure proceeding effectually forecloses all the mortgagor's interest in the mortgaged estate adverse to the plaintiff, held by the former at the time the mortgage was executed, without regard to whether a particular interest then held and afterwards asserted be brought in issue or not, and after such decree, and while it remains in force, the mortgagor is estopped from asserting any anterior right or title to such estate.

From the Tippecanoe Circuit Court.

J. R. Coffroth, T. A. Stuart and B. W. Langdon, for appellants.

W. C. L. Taylor, R. Jones, H. W. Chase, F. W. Chase and F. S. Chase, for appellees.

MITCHELL, J.—Thomas F. and Harry C. Gaylord commenced this suit in the month of February, 1882, with the purpose of establishing their right and quieting their title in and to certain real estate in the city of Lafayette.

The undisputed facts, so far as a decision of the merits of the controversy requires them to be stated, are as follows: On the 9th day of April, 1859, Nathan B. Dodge, grandfather of the appellants, resided in the city of Lafayette, at

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which place he afterwards died in May, 1866. He was twice married ; his second wife, by whom he had one child, survived him.

Of his first marriage there were four children, viz., Joshua Cleves Dodge, who, at the date above mentioned, resided in the city of Boston, Mrs. Emeline F. Granger, Mrs. Martha A. Gaylord, a widow and mother of the appellants, and Mrs. Mary J. Chadwick, with dependent children. The son and daughter first named were in affluent circumstances, while both the daughters last named were comparatively poor. On the date above mentioned Nathan B. Dodge purchased two tracts of land in the city of Lafayette from Albert S. White for \$12,600, which amount he afterwards fully paid. One of the tracts, valued at \$8,500, was conveyed by White, by the direction of Nathan B. Dodge, immediately to Joshua Cleves Dodge. On the same day the conveyance was made by White, Nathan B. Dodge wrote a letter to his son, Joshua Cleves, of which the following is a copy :

“ LAFAYETTE, INDIANA, April 9, 1859.

“ CLEVES—I have this day purchased the A. S. White property. I pay \$12,600 for it. I have 14 rods on Columbia street and 12 rods on Missouri street, and 81 feet fronting on South street. I gave him the house that I live in at \$3,200, a lot that I got in payment for my farm at \$800, and \$6,000 cash in hand, \$1,000 on first of July next, \$1,000 in six months, \$600 one year from to-day. I have had a deed made out to you for the property where he lives—that is, the cottage and large house 145 feet on Columbia street and 12 rods on Missouri street. I shall build myself a house for my own residence on 81 feet and 12 rods back on the east side of the lot, and a house for rent on South, 81 feet front ; the property is now renting for \$500 per year. The property that is deeded to you is worth about \$8,500. That I shall want a deed from you in a few days to Mrs. Gaylord’s children, and Mrs. Chadwick’s. I shall send on a deed for you to sign in a few days. The property is now in your name, and I wish

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you would tell your wife how it is situated now, that she would know all about it if you should be taken away, and if I should, I want that property that is deeded to you to be made over to the four children, the rents and profits to be paid them yearly for their support, and when they become 21 years of age, to have the property in fee simple to dispose of as they please. * * * I think I have bought the White property very low—it cost him \$16,000, and as property is all the time advancing, it must bring that again, but I will not sell it, as it is a good location, and I will let the children have it. * * Will write you again in a few days.

“Yours truly, N. B. DODGE.”

So much of the reply to the above letter as is pertinent, reads as follows:

“BOSTON, April 18th, 1859.

“FATHER—Yours of the 9th was duly received and contents noted. I have told Fanny all about the arrangements you proposed making, in case I should be taken away, and she would follow the injunctions of your letter to me in that event. * * *

Yours truly,

“J. C. DODGE.”

The title to the land referred to in the foregoing correspondence remained as above until the 16th day of November, 1860, when Joshua C. Dodge and wife, at the request of Nathan B., conveyed part of the tract embraced by the deed from White to Joshua C. to Nathan B. Dodge for life, remainder over to Martha A. Gaylord during her life, with remainder over in fee to her two sons, Thomas F. and Harry C. Gaylord. Later on, a similar conveyance was made of the residue of the tract, the title to which remained in Joshua C., with like remainders over, to Mrs. Chadwick and her children. Nathan B. Dodge took possession of the property immediately after the purchase from White, and continued to occupy it until his death, which, as has been seen, occurred in May, 1866, having meanwhile made lasting improvements on the Gaylord tract of the estimated value of \$4,500, and

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on the Chadwick tract of the value of \$6,000. Upon the death of the father, the daughters took possession under the deeds to them respectively.

While so in possession of the parcel conveyed to them as above, Mrs. Gaylord and her two sons, both being at the time over 22 years of age, executed two separate mortgages, covering the Gaylord tract, to secure debts of \$7,000 and \$2,000, respectively, due to Stephen Jones. These debts, which were evidenced by the joint promissory notes of the mother and sons, were subsequently assigned to John S. Williams, who instituted a foreclosure suit in the superior court of Tippecanoe county in 1876, making Mrs. Gaylord and the appellants, Thomas F. and Harry C. Gaylord, parties thereto. On the 25th day of September, 1876, there was found to be due on the several mortgage debts the sum of \$10,304, for which amount a personal judgment was rendered against the mortgagors, which judgment was followed by a decree of foreclosure, and an order directing the sale of the right, title and interest of the mortgagors in and to the property conveyed. The property was sold in pursuance of the decree, John S. Williams becoming the purchaser. It is through this decree and sale that the city of Lafayette claims title to what may be called the Gaylord tract. The Chadwick tract is not directly involved in this litigation.

Upon the facts thus summarized two questions of a controlling character are presented, upon the determination of which the judgment of the court below should either be affirmed or reversed :

1. Was the deed from White to Joshua Cleves Dodge, and the correspondence between the latter and his father, effectual as the declaration of a perfectly created trust, so as to vest the beneficial interest in the land conveyed, at once and irrevocably, in the Gaylord and Chadwick children ?

2. If a trust was thereby at once perfectly created and effectually declared, was the interest which the Gaylord chil-

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dren took in the land in controversy extinguished by the foreclosure proceedings to which they were made parties?

The appellants seek to maintain the affirmative of the first and the negative of the last of the above propositions.

Pertinent to the first point, it may be said, if the transaction created a trust, since the subject-matter thereof was land, it was essential to its validity that it should have been created or declared in conformity with section 2969, R. S. 1881, which provides that "No trust concerning lands, except such as may arise by implication of law, shall be created, unless in writing, signed by the party creating the same, or by his attorney thereto lawfully authorized in writing."

While a literal interpretation of the above statute might seem to require that the deed or instrument in which the estate or property to be affected by the trust is granted or conveyed, shall also contain the declaration of the trusts upon which the property is to be held, it is nevertheless settled that the statute will be satisfied if the trust has been manifested, or can be proved, by any writing under the hand of the party to be charged, or of the party who is by law enabled to declare the same, provided the fiduciary relation, together with the nature, terms and conditions thereof, are set forth in the writing with sufficient certainty, so as to enable a court to carry it into execution in the manner intended by the donor or creator of the trust. 1 Perry Trusts. sections 82, 83; 2 Pom. Eq. Jur., sections 1006, 1007, and notes. There is hence no well founded objection to the alleged trust in the present case, growing out of the fact that it was manifested by the letters which appear in the record, instead of being declared in the deed from White to Joshua C. Dodge. *Forster v. Hale*, 3 Ves. 696; *Brown v. Combs*, 29 N. J. 36; *Raybold v. Raybold*, 20 Pa. St. 308; *Kingsbury v. Burnside*, 58 Ill. 310; *Pinnock v. Clough*, 16 Vt. 500; *Steere v. Steere*, 5 Johns. Ch. 1; *Hollinshead v. Allen*, 17 Pa. St. 275.

The trust in the present case, if one was perfectly created,

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was intended as a provision for the grandchildren of the settlor, who were natural objects of his bounty. It was, therefore, upon such a good or meritorious consideration as to be irrevocable and enforceable in case it was created or declared in such a manner as to fall within the category of executed trusts. *Waterman v. Morgan*, 114 Ind. 237, and cases cited.

A voluntary trust, resting upon a meritorious consideration, and perfectly created, is irrevocable. *Rycroft v. Christy*, 3 Beav. 238; *Paterson v. Murphy*, 11 Hare, 88; *Souverbye v. Arden*, 1 Johns. Ch. 240; *Hildreth v. Elliott*, 8 Pick. 293,

A trust may be said to be executed when it has been perfectly and explicitly declared in a writing duly signed, in which the terms and conditions upon which the legal title to the trust estate has been conveyed, or is held, and the final intention of the creator of the trust in respect thereto, appear with such certainty that nothing remains to be done, except that the trustee, without any further act or appointment from the settlor, carry into effect the intention of the donor as declared. In such a case, even though there was no valuable consideration upon which the trust was originally declared, a court of chancery will enforce it in favor of one whose relation to the donor was such as to show a good or meritorious consideration. *Crawford's Appeal*, 61 Pa. St. 52; *Stone v. Hackett*, 12 Gray, 227; *Ellison v. Ellison*, 6 Ves. 656; *Kekewich v. Manning*, 1 De G. M. & G. 175; 2 Pom. Eq. Jur., section 1001; 1 Perry Trusts, section 98.

Where, however, property has been conveyed upon a trust, the precise nature of which is imperfectly declared, or where the donor reserves the right to define or appoint the trust estate more particularly, although it may be apparent that the creator of the trust has, in a general way, manifested his purpose ultimately, at a time and in a manner thereafter to be determined, either by himself or by the trustee, to bestow the property upon a person named, the trust is incomplete and executory, and not within the jurisdiction of a court of chancery, the rule being that courts of equity will not aid a

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volunteer to carry into effect an imperfect gift or an executory trust. *Adamson v. Lamb*, 3 Blackf. 446 ; *Harman v. James*, 7 Ind. 263 ; *Dillon v. Coppin*, 4 Mylne & C. 647 ; *Colyear v. Mulgrave*, 2 Keen, 81 (97) ; *Edwards v. Jones*, 1 Mylne & C. 226 ; 2 Story Eq. Jur. 793 *b* ; 2 Pom. Eq. Jur., section 1001.

Whether the trust is perfectly executed or not is a question of fact in each case, to be determined by the purposes and objects which the settlor had in view, as manifested in the writing, and from the situation and relation of the parties, and of the property which is the subject of the supposed trust.

In cases where the writing is indefinite or the language ambiguous and of doubtful construction, the practical interpretation given it by the parties themselves in carrying out their purposes, is entitled to great, if not controlling weight and influence. *Reissner v. Oxley*, 80 Ind. 580 ; *Chicago v. Sheldon*, 9 Wall. 50.

In the present case, the land in controversy was conveyed by White to Joshua Cleves Dodge, upon a valuable consideration fully paid by Nathan B. Dodge, the conveyance being so made by the direction and with the consent of the purchaser.

Under the provisions of the statute, no use or trust in the land resulted in favor of Nathan B. Dodge, or any other persons, except to the extent that Joshua Cleves Dodge agreed to hold the land in trust for his father, or to the extent that a trust in favor of the Gaylord and Chadwick children was declared in the letter of Nathan B. Dodge to his son, Joshua Cleves.

Turning now to the letter, and it will be observed that the writer first informs his son that he had purchased the White property at a stipulated price, and that he had caused the legal title to a portion of it to be conveyed to him. He then proceeds to declare his further purpose in relation to the property as follows : " I shall want a deed from you in a few days

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to Mrs. Gaylord's children and Mrs. Chadwick's. I shall send on a deed for you to sign in a few days." This language indicates, beyond the possibility of mistake, that Nathan B. Dodge did not intend that his son, Joshua Cleves Dodge, should take and hold the land in trust for the Gaylord and Chadwick children, except conditionally, until the deeds referred to should be forwarded. His scheme plainly was that the title should be vested in his son for the time being, with a view of ultimately requiring it to be transferred to his grandchildren, in accordance with deeds which he was to have prepared under his own supervision.

The effect of this part of the letter was to create a trust in favor of the father, to hold the title to the land conveyed, until such time as he should, by deeds to be prepared and sent to his son, direct or appoint the ultimate disposition to be made of the estate. The trust estate was conveyed subject to the direction of the father, in the deeds which he reserved the right to require of his son.

While the whole tenor of the letter indicates that it was the purpose of Nathan B. Dodge that the property should be, as it eventually was, settled upon the Gaylord and Chadwick children, it indicates with equal certainty that it was not his purpose to complete the transaction by the conveyance and letter to his son. Something more was to be done by the donor in order to consummate the gift, and vest the title to the property in his grandchildren, in such manner as he might thereafter determine. Taking into account the relation of the parties, the evident desire to make, and the propriety of making, provision for Mrs. Gaylord and Mrs. Chadwick, during their lives, as well as to provide for their children, and it seems to us that the foregoing, in addition to being the interpretation which the parties themselves put upon the letter, is the reasonable and only proper construction to be put upon it.

We have not overlooked that part of the letter of Nathan B. Dodge to his son, in which, after referring to the fact

a prosecution for bastardy is a civil action, and that the rules of practice applicable to other civil actions are applicable to it, except where a different and special procedure is provided. *Galvin v. State, ex rel.*, 56 Ind. 51; *State, ex rel., v. Brown*, 44 Ind. 329; *Hawley v. State, ex rel.*, 69 Ind. 98; *State, ex rel., v. Evans*, 19 Ind. 92; *Stone v. State, ex rel.*, 33 Ind. 538; *Saint v. State, ex rel.*, 68 Ind. 128; *De Priest v. State, ex rel.*, 68 Ind. 569; *Maloney v. Newton*, 85 Ind. 565 (569); *Powell v. State, ex rel.*, 96 Ind. 108.

These cases are in harmony with the letter and spirit of the general provisions of the code, and especially with sections 980 and 983, R. S. 1881, which are as follows:

Section 980. "The prosecution (for bastardy) shall be in the name of the State of Indiana, on the relation of the prosecuting witness; but the rules of evidence shall be the same as in civil cases," etc.

Section 983. "The trial and continuance thereof of such prosecution, both before the justice and in the circuit court, shall, in all respects not herein otherwise provided for, be governed by the law regulating civil suits."

The only reasonable conclusion to be drawn from these statutes, the general provisions of the code, and the cases cited, and others that might be cited, is, that, in a prosecution for bastardy, a preponderance of the evidence is all that is necessary to establish the case against the defendant.

In such a case, as in other civil actions, this court will not reverse the judgment if there is evidence fairly tending to support it. That rule has been uniformly applied. *Dibble v. State, ex rel.*, 48 Ind. 470; *Askren v. State, ex rel.*, 51 Ind. 592; *De Priest v. State, ex rel.*, *supra*.

If any other authority were necessary it will be found in the late case of *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59, where, after a thorough examination of the whole question, and a review of numerous cases and authorities, it was held that in all civil actions, a preponderance of the evidence

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only is necessary to establish the affirmative of an issue, whatever the nature of that issue may be.

We have examined the evidence as we find it in the record. It would not be profitable to set it out in full or in substance. The judgment can not be reversed upon the evidence. The testimony of the relatrix is corroborated, that of appellant is not. The judgment could not be reversed upon the evidence, if the rule contended for by counsel for appellant were the proper rule to apply in such cases. As we have already seen, in a case like this, a preponderance of the evidence is all that is necessary to justify the trial court in finding the affirmative of an issue. And in this court, as already stated, a judgment will not be reversed if there is evidence fairly tending to support it.

Judgment affirmed, with costs.

Filed Sept. 19, 1888.

No. 13,820.

GAYLORD ET AL. v. THE CITY OF LAFAYETTE ET AL.

TRUST.—*Voluntary Trust.*—*Consideration.*—*Irrevocability.*—A voluntary trust, resting upon a meritorious consideration, and perfectly created, is irrevocable.

SAME.—*When Executed.*—*Definition.*—A trust is executed when it has been perfectly and explicitly declared in a writing duly signed, in which the terms and conditions upon which the legal title to the trust estate has been conveyed or is held, and the final intention of the creator of the trust in respect thereto, appear with such certainty that nothing remains to be done except that the trustee, without further act or appointment from such creator, carry into effect his declared intention; and in such case, though there was no original valuable consideration, the

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proceeding the same as if the judgment had no existence. *Nicholson v. Nicholson*, 113 Ind. 131; *Weiss v. Guerineau*, 109 Ind. 438.

A decree against a mortgagor in a foreclosure proceeding, is effectual to foreclose all the mortgagor's interest in the mortgaged estate, adverse to the plaintiff, held by the former at the time the mortgage was executed, without regard to whether a particular interest then held, and afterwards asserted, was brought in issue or not. *Barton v. Anderson*, 104 Ind. 578.

A decree of foreclosure is as comprehensive in its effect upon the title of the mortgagor as is a decree in a proceeding to quiet title. *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 581.

Counsel have presented and discussed other questions which we have considered, and in respect to which we find no reversible error committed by the court. In view of the conclusions already arrived at, these questions do not affect the merits of the case, nor are they of sufficient importance to justify us in stating them.

The judgment is affirmed, with costs.

Filed Sept. 18, 1888.

The New York, Chicago and St. Louis Railway Company v. Doane.

No. 12,665.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. DOANE.

115	435
143	131
115	435
152	438
152	670

NEGLIGENCE.—Railroad.—Carrier of Passengers.—Freight Train.—It is the duty of a railroad company, engaged in the transportation of passengers, whether by freight or passenger trains, to so run and manage its trains, and to so handle its passengers, that no one shall be injured by its own negligence.

SAME.—Passenger on Freight Train.—Rights of.—Liability of Railroad Company.—If a railroad company admits a person into a caboose attached to a freight train, to be transported as a passenger, and takes the customary fare for his transportation as such, it incurs the same liability for his safety as though he had taken passage in one of its regular passenger coaches.

SAME.—Stations and Platforms.—Duty of Carrier to Passenger.—It is the duty of a railroad company to provide suitable stations and platforms to enable passengers to enter its cars and alight therefrom with safety, to stop its trains at the station so that passengers may alight upon the platform, and if passengers are required to alight at any other point, the company is liable for any injuries resulting thereby to such passengers.

SAME.—Exceptions as to Freight Trains.—Where a freight train is accustomed to discharge its passengers at some place other than the platform, or where it is impracticable for it to reach the platform with the caboose or car in which passengers are carried, the passengers may be required to leave the train at some other appropriate and convenient place not connected with the platform; but in such case the passengers are entitled to receive such care and attention as are necessary to enable them to properly reach the station.

SAME.—Rights of Passenger.—Liability of Carrier.—The duty of a railroad company as a common carrier of passengers is not performed until it delivers its passenger in proper condition at the station to which he has paid his fare; and where a passenger on a railroad train is carried past his point of destination, it is the duty of those in charge of the train to either back the same to the station, or to notify the passenger how and where to alight, warn him of any dangers incident to alighting at that point, and give him such assistance or instructions as may be necessary to assure his safe return to the station; and if, without the fault of the passenger, he is injured in making his way back to the station, the company is liable therefor.

From the Kosciusko Circuit Court.

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J. B. Cohrs, J. S. Frazer and W. D. Frazer, for appellant.
J. D. Widaman and J. W. Cook, for appellee.

NIBLACK, C. J.—Notwithstanding some discrepancies between witnesses on certain matters of minor importance, there was evidence in this case very strongly tending to establish the following facts: That, during the year 1883, as well as since that time, the appellant, the New York, Chicago and St. Louis Railway Company, ran a train of cars, known as a local freight train, daily over its line of road, between a point near the city of Chicago, in the State of Illinois, and the city of Fort Wayne, in this State; that it was in the habit of carrying passengers in a caboose attached to the rear end of that train, between all the stations on that part of its line of road; that the appellee, Rebecca Doane, on the 18th day of June, 1883, entered the caboose of that train, at a station on the road known as Mentone, for the purpose of being conveyed as a passenger to a station nine or ten miles further east called Claypool, and paid to the conductor of the train the amount demanded by him for transportation to the station last named; that there was a depot, or station-house, with a platform forty or fifty feet long attached, on the north side of the road at Claypool; that the train consisted of near, if not quite, thirty cars; that when it reached Claypool it stopped alongside of the platform, the caboose standing on the track at least several lengths of cars, and probably several hundred feet, west of the platform; that several freight cars were at the time standing on a switch on the south side of, and immediately adjacent to, the caboose; that on the north side of the caboose a ditch, containing some water, several feet deep and four or five feet wide, ran along, near and parallel with the railway track; that Mrs. Doane was unable to see any safe or convenient way of getting out of, or away from, the caboose; that there was a plank across the ditch, some fifty or sixty feet east of the caboose, over which persons sometimes walked, but the strip of ground

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between the ditch and the railway track was so narrow as to make it impracticable for her to attempt to reach the plank, with her two bundles of baggage, which she was carrying with her; that, being told by one of her fellow-passengers that the train would probably pull up to and let her off at the platform, she remained in the caboose; that at or about the time the train stopped, the conductor, and the only brakeman then near it, left the caboose without giving Mrs. Doane any directions as to how or when she could safely leave the train, and without offering her any assistance in leaving it; that before leaving the caboose the brakeman announced the name of the station, but from dullness of hearing, or some other cause, she did not hear the announcement; that she was, however, otherwise informed that the train was approaching Claypool; that after the expiration of fifteen or twenty minutes the train proceeded on its way east, without stopping at the platform; that in passing the platform the conductor stepped from it into the caboose, and, seeing that Mrs. Doane was still on the train, he climbed on top and gave the necessary signal to have the train stopped; that the train was stopped accordingly on a curve eighty or ninety rods away from, but still in sight of, the station-house; that Mrs. Doane thereupon demanded that she should be returned to the station by backing up the train, but the conductor declined to so back up the train, and requested her to get off where the train then was, which, with his assistance, she did, the locality being one with which she was entirely unacquainted; that on her reaching the ground, the conductor either said or did something which impressed her with the belief that she could easily get back to the station by walking on the railway track, and that this was the best route for her to take; that where she left the train there was a wire fence, consisting in part of barbed wires, on both sides of the railway track, running back to a railroad crossing near the station-house; that, seeing no other way open to her, she, with her bundles, started along the track in the direction of the sta-

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tion-house ; that she had proceeded only a short distance when she came to a cattle-pit, from which plank fences three or four feet high extended each way to the respective wire fences ; that, realizing the danger there might be in attempting to pass over the cattle-pit, but failing to observe any means of getting around it, and fearing she might be caught by some other passing train, she stepped upon, and started to walk over, the cattle-pit, exercising as much care as was consistent with her then excited and very nervous condition ; that, when about half-way across the cattle-pit, she fell and broke one of her arms near the wrist, and was otherwise bruised and injured ; that, with the assistance of a gentleman who came to her relief, she got back to the station-house, where she received surgical aid and attention ; that the injury to her arm had proved to be a very painful and permanent injury ; that her wrist had not regained, and never would regain, its normal condition, her arm being thus left in a maimed and weakened predicament.

It was also shown that somewhere, not far from where Mrs. Doane left the train, there was a gate on the north side of the road, which opened into a private lane running north through a farm ; that some distance further north there was another gate on the west side of the lane, which led into an open field ; that she might have gone through these two gates and thence through the open field, and by a circuitous route, have reached the station-house without walking upon the railway track, but she had no knowledge of the fact that she might get to the station-house in that way, and nothing occurred to direct her attention to the practicability of her getting back by that or any other route outside of the railway track.

A jury returned a verdict in favor of Mrs. Doane, assessing her damages at one thousand dollars, and, over exceptions reserved, judgment was given upon the verdict.

Error is assigned upon the overruling of a demurrer to

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the complaint, which consisted of two paragraphs, and the refusal of the circuit court to grant a new trial.

In support of the errors assigned, it is sought to be maintained in argument :

First. That upon the facts contained in the complaint, and substantially proven at the trial, Mrs. Doane was guilty of contributory negligence in not leaving the caboose when the train stopped at Claypool, and also in attempting to walk back along the railway track, and over the cattle-pit, after she left the train.

Secondly. That, upon the facts as stated, the injury complained of was too remote to constitute a cause of action against the railway company.

Thirdly. That the damages assessed were, in any view which ought to be taken of the facts as proven, excessive.

Fourthly. That certain instructions given to the jury were erroneous.

A railroad company may refuse to carry passengers on its freight trains, but if it admits a person into a caboose attached to one of its freight trains, to be transported as a passenger, and takes the customary fare for his transportation as such, it incurs the same liability for his safety as though he had taken passage in one of its regular passenger coaches.

It is neither expected nor required that a passenger upon a freight train shall be provided with all the comforts and conveniences which are usually afforded passengers on a regular passenger train, but there is, on that account, no diminution in the obligation of those in charge of the freight train to carry its passengers with becoming and all necessary care, and to deliver them safely at, or conveniently near, their respective places of destination. It is the duty of a railroad company engaged in the transportation of passengers, whether by freight or passenger trains, to so run and manage its trains, and to so handle its passengers, that no one shall be injured by its own negligence. 2 Wood Railway Law, 1121, *et seq.*;

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Ohio, etc., R. W. Co. v. Selby, 47 Ind. 471 (17 Am. R. 719);
Ohio, etc., R. W. Co. v. Dickerson, 59 Ind. 317.

It is, also, the duty of a railroad company to provide suitable stations and platforms to enable persons to enter its cars, and passengers to safely alight when they have accomplished their journey. As pertinent to that duty, Wood, *supra*, at section 305, on page 1123, says, and we have no doubt correctly, that "The trains must be stopped at the station so that passengers can alight upon the platform, and if they are stopped at any other place, and the station is called, so that passengers are required, or have a right to understand that they are required to stop there, the company is liable for injuries received in leaving such place, to the same extent and upon the same ground that it would be liable for injuries received from the defectiveness of its own premises. *White Water R. R. Co. v. Butler*, 112 Ind. 598.

These general principles apply as well to the carrying of passengers by freight as by passenger trains, subject only to such modifications as are made necessary by the nature of the business in which freight trains may be engaged. Where a freight train is accustomed to discharge its passengers at some place other than the platform, or where it is impracticable for it to reach the platform with its caboose, or other car in which its passengers are carried, it may require passengers to leave its train at some other appropriate and convenient place, not connected with the platform. In such an event, however, passengers are entitled to receive such care and attention as are necessary to enable them to properly reach the station, and this is especially so where the place at which they are discharged is either inappropriate or inconvenient. *Woolery v. Louisville, etc., R. W. Co.*, 107 Ind. 381. Further on, at page 1186, the same author says that "If the train overshoots or stops short of the platform at an unusual place, it is held that the company is bound to assist the passengers to alight, and in any event, in such a case it would be its duty to either back the train to the station or

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notify the passengers where and how to alight, and warn them of any dangers incident to alighting at that point; and if through no fault of the passenger, he is injured by alighting at that point, or in getting from there to the station or highway, the company is liable therefor."

Applying these principles to the facts of this case, the railway company failed in its duty in not either stopping the caboose at the platform at Claypool, or assisting Mrs. Doane to alight from the train when it stopped west of that place, and to reach the station in safety. Under all the circumstances, she was justified in not leaving the caboose where it stopped, as well as in inferring that it would be pulled up to the platform before leaving the station. It also failed to perform a plain and very urgent duty when it neglected to either back its train to a convenient point near the station, or to give her such assistance or instructions as were necessary to assure her safe return to the station-house after it had carried her beyond her place of destination. The duty of a railroad company as a common carrier of passengers is not fully performed until it delivers its passenger in proper condition at the station to which he has paid his fare.

Mrs. Doane was not guilty of negligence in failing to discover some gates leading into private enclosures, and into an open and remote field through which she might have returned to the station by an unmarked and circuitous route. It was, under the circumstances, not only natural, but reasonable, aside from any directions or intimations which the conductor may have given her, that she should have attempted to follow the railway track back to the station-house. Until she reached that point, she was still constructively a passenger on the railway train, and had a right to rely upon any information or directions which she may have received from the conductor. See Wood, *supra*, pp. 1124, 1125, 1126.

Nor was Mrs. Doane guilty of contributory negligence in her effort to walk over the cattle-pit. It was important to

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her that she should pass that place in some way, and within a reasonable time, and no other practicable method of passing it was apparently open to her.

It is a matter within the common knowledge of all, that a person may, by the exercise of a high degree of care, ordinarily walk with safety over a cattle-pit. But a cattle-pit is not a suitable place to compel a passenger to walk over to reach the end of his journey, and it was negligence on the part of the railway company to place her in a position which seemingly required her to incur the hazard of walking upon such a place. It is an old rule, that where one person places another in such a situation that the latter must adopt a perilous alternative, the former is responsible for the consequences. *Jones v. Boyce*, 1 Starkie, 402.

A practical application of this rule, in aid of the general principles previously announced as above, leads us to the further conclusion that the injuries to Mrs. Doane were proximately caused by the negligence of the railway company. This view is fully sustained by the cases of *Cincinnati, etc., R. R. Co. v. Eaton*, 94 Ind. 474, and *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346.

Nothing is shown from which we can infer that the damages were excessive. Notwithstanding Mrs. Doane had, at the time of her injuries, passed the meridian of life, the maiming and permanent disabling of her arm was no trivial matter to her. She thereby became very materially less able to earn her own living (which she had been accustomed to do), for the rest of her life. The amount she recovered impresses us as a very moderate compensation for the injuries for which she sued.

Objections are specifically made to some of the instructions given to the jury, but none of the instructions complained of are inconsistent with the legal principles we have applied to the evidence, and hence what we have already said practically disposes of all the questions made upon the instruc-

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tions. Having in view the same legal principles, the demurrer to the complaint was rightly overruled.

The judgment is affirmed, with costs.

Filed Sept. 20, 1888.

No. 13,854.

THE OHIO AND MISSISSIPPI RAILROAD COMPANY v.
HECHT.

NEGLIGENCE.—Personal Injury.—Compensatory Damages.—The plaintiff in an action for personal injuries is entitled to full compensatory damages where a disease caused by the injury supervenes and proximately results from the defendant's wrong, as well as where the disease exists at the time of the injury, and is aggravated by it.

SAME.—Contributory Negligence.—Must Have Contributed to Injury.—In an action for personal injuries resulting from the negligence of the defendant, the negligence of the plaintiff will not preclude a recovery unless it contributed to his injury.

SAME.—Instruction to Jury.—Occupation of Plaintiff.—Damages.—In such action, an instruction to the jury that they may consider the occupation of the plaintiff, and that they may give him such a sum as will fully compensate him for the injuries he received, is not erroneous.

From the Jefferson Circuit Court.

H. D. McMullen and *J. McGregor*, for appellant.

C. A. Korbly and *W. O. Ford*, for appellee.

ELLIOTT, J.—The appellee bought a ticket entitling him to passage on the trains of the appellant, and, while at the appellant's station at North Vernon, for the purpose of entering one of its trains, as he was entitled to do under the ticket he had purchased, he was injured, without any fault on his part, by stepping into a hole in the platform, which

115	443
116	457
117	436
115	443
124	463
126	233
115	443
128	510
133	450
115	413
138	61
115	443
141	565
115	443
146	608
115	443
167	91

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the appellant, in disregard of its duty, had negligently permitted to remain unprotected. The complaint thus describes the injury sustained by the appellee, and states the damages occasioned by the wrong of the carrier: "The plaintiff was violently thrown down and upon his valise, which he was carrying in his hand, and his foot and ankle were sprained, strained, and otherwise greatly injured and bruised, and the ligaments and tendons of plaintiff's foot were strained and drawn and permanently injured, so that the plaintiff suffered great pain and anguish and became sick, sore and lame, and was confined to his bed and room from thence hitherto, and was wholly incapacitated from attending to his usual vocation, and he laid out and expended a large sum of money, to wit, \$—— for doctor's fees and medicines and nursing, in attempting to be cured of said hurt, and received a permanent injury which will lame him for life and always impede his successful prosecution of his business, whereby he has sustained damages in the sum of five thousand dollars."

The complaint makes a case entitling the appellee to full compensation for the injury which proximately resulted from the appellant's wrong. Where a disease caused by the injury supervenes, as well as where the disease exists at the time of the injury, and is aggravated by it, the plaintiff is entitled to full compensatory damages. The decisions upon this point are numerous and harmonious. *Louisville, etc., R. W. Co. v. Wood*, 113 Ind. 544, and cases cited p. 567; *Louisville, etc., R. W. Co. v. Jones*, 108 Ind. 551; *Indianapolis, etc., R. W. Co. v. Pitzer*, 109 Ind. 179, and cases cited p. 188; *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409; *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346; *Jeffersonville, etc., R. R. Co. v. Riley*, 39 Ind. 568; *Keyser v. Chicago, etc., R. W. Co.*, 33 N. W. Rep. 867; *Quackenbush v. Chicago, etc., R. W. Co.*, 73 Iowa, 458.

The complaint is sufficiently comprehensive to entitle the plaintiff to give evidence of the nature and consequences of his injury.

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In *Ehrgott v. Mayor*, 96 N. Y. 264, it was said by the court: "Upon the trial plaintiff gave evidence tending to show that he had a disease of the spine of a permanent nature as the result of his injuries. This evidence was objected to by the counsel for the city, on the ground that the plaintiff had not alleged such a result from the injury in his complaint. We think the complaint is sufficient. It alleges that he suffered great bodily injury; that he became, and still continues to be, sick, sore and disabled; that he was obliged to spend large sums in attempting to cure himself, and was prevented for a long time from attending to his business, and that he was otherwise injured to his damage \$25,000. These allegations are sufficient to authorize proof of any bodily injury resulting from the accident, and if the defendant desired that they should be more definite, it could have moved to have them made more specific, or for a bill of particulars."

Chief Justice CAMPBELL said, in *Johnson v. McKee*, 27 Mich. 471: "When the defendant was informed that damages were sought for sickness and disorder, and their attendant expenses, as well as for wounds and bruises, he was bound to expect evidence of any sickness the origin or aggravation of which could be traced to the act complained of."

In the case of *Delie v. Chicago, etc., R. W. Co.*, 51 Wis. 400, the question before us was carefully examined and well discussed, the court saying, among other things, that "It is not claimed on the part of the appellant, that the complaint does not state a cause of action. If the allegations of injury are sufficient to entitle the plaintiff to recover anything more than nominal damages, then it seems to us very clear that he is entitled to recover such damages as he actually sustained by reason of all the injuries to his person resulting from the accident, and that, in order to enable the jury to estimate his damages, he must be permitted to show what those injuries in fact were. We think that, in cases of this kind, if the defendant does not desire to have the plaintiff make his allegations as to the nature of his injuries more

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definite and certain, and does not ask to have it done by a proper motion for that purpose, he must come prepared to meet any proof which the plaintiff may offer which shows or tends to show the real nature of the injuries which were the direct result of the accident. This, we think, was the rule held, even under the old practice, by this court in *Birchard v. Booth*, 4 Wis. 74 (92). In that case the court held that, under allegations as general as in this case, the plaintiff might show that as one of the results of the battery his shoulder-blade was broken. The present chief justice, in his opinion in that case, says: 'It was contended on the argument that the fracture of the shoulder-blade should have been specially and circumstantially set forth in order to apprise the defendant of the fact to be proved; and that it was a surprise upon him to admit proof of it under the general language of wounding, beating, bruising, etc.; and, although we think such a special statement of the injury might have been very proper, yet we can not say that it was essentially necessary. As already stated, we can but view that injury as the natural and necessary result or consequence of the battery. That wrongful act was the efficient producing cause of the fracture and loss of health, and we think it is sufficient to allege it in this general manner.' See, also, *Schmidt v. Pfeil*, 24 Wis. 452 (455). If, under the old rules of pleading, under general allegations of wounding, bruising and beating, the plaintiff could be permitted to show all the injuries to the person which resulted from the battery, there is much greater reason for allowing such evidence under the code practice, which gives the defendant the clear right to have the general allegations made more specific and certain if he desires it."

At another place it was said: "But the counsel for the appellant urges that, as the hernia did not make its appearance until nine months after the accident, it can not be said that it was the result of the accident, and certainly not the direct and immediate result thereof, and therefore evidence concerning it should not have been admitted under the allega-

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tions of the complaint. If the hernia had appeared immediately after the accident, under the rule above stated, there would be no doubt as to the right of the plaintiff to prove the facts as one of the results of the injury; and we think the mere fact that it did not become apparent to the plaintiff until some time after, can make no difference as to the right of the plaintiff to show that it was in fact caused by the accident."

Our own decisions declare the rule substantially as the cases we have cited.

In *Ohio, etc., R. W. Co. v. Selby*, 47 Ind. 471, it was said: "The complaint charged that the plaintiff was grievously bruised, hurt, and injured. Under these general allegations, the plaintiff was entitled to prove any and all injuries which he received, and which were the natural consequence of the wrongful act of the appellant."

It was said by the court in the case of *Wabash R. W. Co. v. Savage*, 110 Ind. 156, that: "After Dr. Young had as a witness explained the nature of the injury which the plaintiff had received, and the remedy resorted to for his relief, he was, over objection of the defendant, permitted to say that the effect of the injury would be very deleterious to the plaintiff's nervous, as well as to his general system, and that the injury would thereafter have an injurious effect upon his strength and power of physical endurance. It is insisted that there was nothing in any of the averments of the complaint, which justified the admission of such evidence, and that for that reason its admission was erroneous. As will be seen by a recurrence to the complaint, it concluded with the averment, that the plaintiff had 'Thereby become wholly crippled and maimed, and prevented from actively pursuing his business, for life.' Under our decided cases, that averment was quite sufficient to let in the evidence complained of."

This is the doctrine declared in the cases of *Town of Elkhart v. Ritter*, 66 Ind. 136, *Indiana Car Co. v. Parker*, 100

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Ind. 181, *Carthage T. P. Co. v. Andrews*, 102 Ind. 138, and *Louisville, etc., R. W. Co. v. Falvey*, *supra*.

The case of *Brown v. Byroads*, 47 Ind. 435, cited by the appellant, decides nothing upon the point here in dispute. The case of *Teagarden v. Hetfield*, 11 Ind. 522, simply decides that a complaint praying damages for unlawfully killing a mare, does not entitle the plaintiff to recover, in addition to the value of the mare, compensation for taking care of two colts which were suckling the mare at the time she was killed.

The pervading fallacy in the argument of appellant's counsel is that of undue assumption. He unduly assumes that the illness and permanent injury resulting from the tort are to be deemed special damages. On this point it is said in a very late edition of an excellent text-book, that "There is substantial uniformity of doctrine that every such subsequently developed disease, which would naturally ensue from the injury, and which can not be shown to have resulted from a sufficient independent cause, must be imputed to the author of the original injury. Though the plaintiff be afflicted with a disease or a weakness which has a tendency to aggravate the injury, defendant's negligence will still be held to be the proximate cause; and the defence that the sufferer died from an independent disease is not made out, unless it is clearly shown that death must have ensued, independent of the injury. Aggravation of an existing disease may be allowed for in the damages awarded." 2 Shearman & Redfield Neg. (4th ed.), section 742. This is substantially the doctrine of the cases already referred to, and to them may be added the cases of *Jucker v. Chicago, etc., R. W. Co.*, 52 Wis. 150; *Denver, etc., R. W. Co. v. Harris*, 122 U. S. 597; *Lake Shore, etc., R. W. Co. v. Rosenzweig*, 113 Pa. St. 519; *Houston, etc., R. W. Co. v. Leslie*, 57 Texas, 83.

The court gave to the jury this instruction: "It is not enough that the plaintiff may not have used ordinary care

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while on the defendant's platform and while he was about to enter the defendant's cars (if such want of care is proved), but such want of care must have contributed to the injury, to bar the plaintiff from recovery if his right to recover is otherwise shown by the evidence."

If this instruction stood alone it would not, we incline to think, warrant a reversal, for it is well settled that a plaintiff's negligence does not preclude a recovery unless it contributed to his injury. It is not mere negligence that bars a recovery, for the negligence must also be contributory. *Nave v. Flack*, 90 Ind. 205; *Louisville, etc., R. W. Co. v. Richardson*, 66 Ind. 43, 48; 1 Shearman & Redfield Neg. (4th ed.), section 94; Wharton Neg., section 303; Cooley Torts, 679; Beach Contrib. Neg., section 3.

But the instruction must be considered with others upon the same point, and, when thus considered, it is quite clear that the appellant has no just cause of complaint, for the other instructions clearly and explicitly directed the jury that the plaintiff could not recover unless he proved that he was not guilty of contributory negligence. In one of the instructions given, the court told the jury, among other things, that the plaintiff was bound to prove by a preponderance of the evidence "that he was not guilty of any contributory negligence; that the injury complained of was received without his fault."

The court did not err in instructing the jury that they might consider the occupation of the plaintiff, and that they might give him such a sum as would fully compensate him for the injuries he received. *Louisville, etc., R. R. Co. v. Falvey, supra*; *Carthage T. P. Co. v. Andrews, supra*; *Indiana Car Co. v. Parker*, 100 Ind. 181, 195; *City of Indianapolis v. Gaston*, 58 Ind. 224.

What we have said in disposing of the questions made upon the complaint and the competency of the evidence un-

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der it, disposes of the other questions made upon the instructions.

Judgment affirmed.

Filed June 16, 1888; petition for a rehearing overruled Sept. 20, 1888.

115	450
138	24

115	450
156	462

No. 13,235.

THE EVANSVILLE AND TERRE HAUTE RAILROAD COMPANY
v. GUYTON.

NEGLIGENCE.—Railroad.—Diligence Required in Selecting Employees.—Competency of Employees.—It is the duty of a railroad company to exercise reasonable and ordinary diligence in the selection of its employees, having respect for the exigencies of the particular service required, to the end that it may ascertain their competency and fitness to be entrusted in such service.

SAME.—Liability of Employer for Incompetence of Employee.—Injury to Co-Employee.—In case an employee proves to be incompetent for the duty assigned him, and ordinary care has not been used in his selection, or if he be retained after notice of his incompetency, the employer will be liable to a co-employee whose injury results proximately from the lack of qualification of the fellow-servant, unless the person injured had notice of the incompetency or had equal opportunities with the employer to obtain notice.

SAME.—Evidence.—Character of Injury, etc.—In an action for personal injuries alleged to have been occasioned by the wrong of another, the plaintiff may give testimony showing the character and extent of his injury, the nature and intensity of the suffering therefrom; and, where the injury resulted from a railroad accident, testimony that the plaintiff immediately after the injury walked a quarter of a mile to flag another train, and became unconscious from loss of blood, pain and exhaustion, resulting from the injury, is admissible.

EVIDENCE.—Proof of Specific Acts of Incompetent Employee.—In such case, where the injury is claimed to have been caused by the incompetency of an employee of the defendant, an instruction to the jury that “any

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evidence tending to show a specific act of incompetence is only admissible for the purpose of showing that the defendant had not exercised due care in the employment of, or retaining in service such employee, and to bring notice to the defendant of incompetence," was correctly refused.

From the Gibson Circuit Court.

J. E. Iglehart and *E. Taylor*, for appellant.

A. Gilchrist, *C. A. DeBruler* and *D. B. Kumler*, for appellee.

MITCHELL, C. J.—Guyton was severely injured in a collision, which occurred on the appellant railway company's road, on the 20th day of August, 1882, while serving in the capacity of brakeman on one of the company's trains. He brought an action to recover damages for the injuries sustained, and recovered a judgment in the Gibson Circuit Court, from which this appeal is prosecuted.

His case proceeded upon the theory that the collision resulted from the incompetency of Charles Stice, the conductor who had control of the train upon which the plaintiff was at the time employed as brakeman, and that the liability of the company grew out of its failure to exercise proper care in the selection of conductor Stice, whose alleged incapacity resulted in the collision.

There are certain undisputed facts in the case. For instance, there is no dispute but that the railway company put Charles Stice in charge of a wild train, as conductor, to run from Terre Haute to Evansville, on the date above mentioned, and that the train was being run upon telegraphic orders and not upon schedule time. The plaintiff was a brakeman on this train, which was called the "C. & E. train, special." Some fourteen miles from Vincennes, at a station called Oaktown, Stice received a message from the train dispatcher of the following tenor:

"*C. & E. Train, Special:*

"Run to Vincennes freight station regardless second sec-

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tion train twenty (20), and to Smith's regardless eighteen (18). C. J. H."

Smith's is a station between Oaktown and Vincennes. It is conceded that the meaning of the dispatch, as it would or should have been understood by a competent conductor, in connection with the schedule for regular trains, with which train dispatchers assume conductors are familiar, was, that Stice should run his train to Smith's, and wait there until number eighteen, a schedule train, and until the first section of number twenty, another schedule train, should pass, and then run to Vincennes, regardless of the second section of train twenty. Instead of properly interpreting and executing the order, which is shown to have been correctly given, the conductor ran his train to Smith's, waited until number eighteen passed, and then, although it was within a few minutes of the regular schedule time of number twenty, started out with his wild train, under the mistaken impression that he was to run to Vincennes regardless of train twenty. The result was a collision between the wild train and the first section of twenty, which was on its regular time, within a few miles of Smith's.

The evidence tends to show that Stice had been in the service of the company as brakeman for a period of six or seven years prior to the accident, and that he had been promoted to the position of freight conductor within a period of less than a month before the collision. The testimony preponderates strongly, we may say overwhelmingly, in favor of the general good character, competency and skill of the conductor while serving in the capacity of brakeman, and of his general qualification to act as conductor of a freight train. He testified that he understood the order above set out, and that his pulling out his train in disobedience of it was the result of thoughtlessness and a mistake.

There was some testimony, however, from which the jury may have found that he was not possessed of sufficient familiarity with the time-cards, and with the technical language

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of train orders, and was not sufficiently quick of apprehension to be able to construe and interpret an order in connection with a time-card, so as to be competent to act as the conductor of a wild train.

In view of the fact that Stice had been promoted to the position of conductor but recently before the accident, and that more than ordinary vigilance and aptitude were required for the control and safe management of trains such as the one he was entrusted with, and in view of the further fact that there is good evidence which tends to show that, contrary to the requirements of the general rules of the company, Stice had been assigned to duty as a conductor without the usual inquiry or examination in respect to his qualifications, we are constrained to hold that the evidence tends to support what the jury must have found, viz., that Stice was incompetent to act as conductor of a wild train, and that the railroad company was remiss in its duty in selecting him for that service.

While the railroad company, in relation to the plaintiff, was not bound to guarantee the absolute fitness of the conductor, it was its duty, nevertheless, to exercise reasonable and ordinary diligence, having respect for the exigencies of the particular service required, to the end that it might ascertain the qualification and competency of the conductor, and whether or not he was fit to be entrusted with the responsible station to which he was assigned. *Wabash R. W. Co. v. McDaniels*, 107 U. S. 454; *Patterson Railway Accident Law*, 313.

In employing its subordinates it was the duty of the company to exercise a degree of care commensurate with the responsibilities of the position in which they were to be placed, and with the consequences which might ensue from incompetence or unskilfulness on the part of those employed. In case peculiar fitness was required, or special qualifications demanded for the service to be performed, unless it was assured by the previous like service of the conductor of his fit-

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ness, the duty of the company required it to institute affirmative inquiries in order to ascertain his qualification in that regard.

In case an employee proves to be incompetent for the duty assigned him, and ordinary care has not been used in his selection, or if he be retained after notice of his incompetency, the employer will be liable to a co-employee, whose injury results proximately from the lack of qualification of the fellow-servant, unless the person injured had notice of the incompetency, or had equal opportunities with the employer to obtain notice. *Pennsylvania Co. v. Roney*, 89 Ind. 453; *Lake Shore, etc., R. W. Co. v. Stupak*, 108 Ind. 1; *Pittsburgh, etc., R. W. Co. v. Ruby*, 38 Ind. 294; *Chapman v. Erie, etc., R. W. Co.*, 55 N. Y. 579; *Mann v. President, etc.*, 91 N. Y. 495; *Baulec v. New York, etc., R. R. Co.*, 59 N. Y. 356.

It may be conceded that the evidence in the record fully establishes the fact that Stice had been for years a faithful, vigilant and competent brakeman, and that he had fairly earned his recent promotion to the position of freight conductor by long and diligent service for the company, and the idea is not to be tolerated that the law will pronounce a person, who is shown to be qualified by years of efficient service, incompetent because of a single mistake or act of forgetfulness. The fact can not, however, be disguised that a single act, with the circumstances surrounding it, where the consequences are so overwhelming as the bringing of two trains of cars, running at a high rate of speed, into collision, on the same railroad track, may tend very strongly to show the incompetency of the actor to perform the service to which he was assigned.

It should be remembered that Stice had served the company as brakeman until quite recently before the unfortunate accident, and while his service as brakeman is not to be disregarded in determining his competency to act in the more responsible position of conductor, it does not follow, without

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more, that because he was an efficient and competent brakeman, and fit for promotion, he was also competent to take charge of and run a wild train. These considerations lead us to conclude that we can not disturb the verdict and judgment on the evidence.

At the trial, the plaintiff, after stating how the accident occurred and the manner and extent of his injury, was permitted to state, over objection, that as soon as he had extricated himself from the wreck produced by the collision, it occurred to him that a passenger train, designated as number five, would be due at that point in a short time, and remembering that as brakeman it was his duty to flag the approaching train, so as to prevent it from running into the wreck, he proceeded, in the disabled and suffering condition in which he described himself, along the track in the direction from which the train was approaching, for the distance of about one fourth of a mile, and flagged the train. He was permitted to state that in getting the flag he had fallen out of the caboose from weakness and loss of blood, and that he suffered great pain in going back to discharge the duty which he felt was incumbent upon him, and that, after flagging the train and entering one of the cars, he fell unconscious, in which condition he remained until the next day. It is objected that this testimony was improperly admitted, and that it could only have been introduced for the purpose of exciting the sympathy of the jury in the plaintiff's behalf and to induce them to compensate him for what might be considered a praiseworthy act, instead of compensating him for the injuries resulting from the collision. The testimony was competent. It was admissible, not because the act of flagging the train, however meritorious that was, could be considered by the jury in fixing the amount of compensation, but because the plaintiff was entitled to recover, not only for the permanent injury sustained, but for the physical pain and mental suffering occasioned by the injury. He was entitled to communicate to the jury the character and

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extent of his injury, and the nature and intensity of the suffering resulting therefrom. If the plaintiff had voluntarily walked a quarter of a mile, or any other distance, immediately after receiving the injury, and, after enduring great suffering, had been taken up by a passing train, and had thereupon become unconscious from pain, exhaustion and loss of blood, resulting from the injury, it can not be doubted that the facts might have been stated. The facts following immediately in connection with the injury were none the less admissible because the plaintiff was impelled to exert himself by a high sense of duty to those on the approaching train. As brakeman upon the wrecked train, it was the plaintiff's duty, as it appeared to him under the circumstances, to flag the on-coming passenger train, and prevent the destruction of human life which might have followed had no warning been given. This was the highest conception of the duty of a brakeman. That the plaintiff had the courage and manliness to perform it, regardless of his own suffering, is to be spoken of in commendation and praise.

Some other rulings of the court relating to the admission of evidence upon matters of minor importance are the subjects of criticism. We have examined the questions, and, without delaying to state them in detail, we have been unable to discover any error in that connection. So, in respect to certain alleged extra-professional statements made by counsel in addressing the jury, of which the appellant complains, it is only necessary to say, if the legitimate privileges of debate were violated, the matter was set right by the court in such manner as that no harm could have resulted.

The objections to the instructions given by the court upon the request of the plaintiff below are not of sufficient importance, nor are they presented in such a manner as to require that they be separately stated and commented upon. A careful examination fails to disclose any valid objection to those complained of.

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The appellant complains on account of the refusal of the court to give the following instruction :

“It is the part of wisdom for railroad corporations to take men employed by them from inferior positions and place them in higher ones, as they thus hold out the highest inducement to those in their employ to become skilful and faithful in the performance of their duties. The company has the means of ascertaining accurately the habits and character of its men, and to fill all vacancies with those who are known to be skilful and deserving.”

As a statement of the general policy proper to be observed by railroad corporations in respect to the advancement of their employees, the instruction asked was certainly, so far as we are advised, unobjectionable ; but the instances are rare in which it is proper for a court to declare as matter of law whether or not a certain policy as applied to the management of a particular business is wise or unwise.. These are questions of fact for the jury, rather than questions of law for the court. *Unruh v. State, ex rel.*, 105 Ind. 117.

Instructions should state legal principles applicable to the facts of the case, and not mere general rules of policy which may, or may not, be wise and proper in the conduct of a particular business. *Union Mut. L. Ins. Co. v. Buchanan*, 100 Ind. 63.

The following instruction was also asked and refused :

“Any evidence of the plaintiff tending to show a specific act of incompetence on the part of Stice, conductor, if there is any such evidence, is only admissible for the purpose of showing that the company had not exercised due care, prudence and caution in the employment of, or retaining in service of a careful, prudent and skilful conductor, and to bring notice to the defendant of incompetence.”

While a specific act or mistake will not necessarily establish incompetence, as has already been remarked, a single act may be of such a character, and may involve such consequences as, with the surrounding circumstances, to indicate

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want of qualification on the part of the actor. Such acts are usually resorted to by witnesses as a basis for an opinion as to the qualification of the person whose competency for a particular service is in question. In such cases the acts, with the accompanying evidence, are proper to be considered by the jury. *Pittsburgh, etc., R. W. Co. v. Ruby, supra.*

The court also refused to charge that "Specific acts of negligence are not competent to show that the conductor, Stice, was guilty of negligence in producing the collision, as charged in the complaint, if it were on a different occasion."

While the foregoing is undoubtedly a correct statement of the law, when considered in connection with evidence to which it is applicable, the refusal of the court in the present case is not available to the appellant.

The appellant's theory, and that of its witnesses, was that the collision was attributable, not to the incompetency of Stice, but to his neglect. The appellant impliedly, at least, admitted the negligence of Stice, but insisted that he was not incompetent. There was no evidence to which the instruction was applicable.

We have discovered no error justifying a reversal. The judgment is affirmed, with costs.

Filed May 10, 1888; petition for a rehearing overruled Sept. 19, 1888.

Moulder v. Kempff.

No. 14,133.

MOULDER v. KEMPF.

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CONTINUANCE.—*Motion for.*—*Discretion of Court.*—*Practice.*—A motion to postpone or continue a cause is addressed to the discretion of the trial court, and a judgment will not be reversed on account of a ruling upon such motion, unless it very clearly appears that the discretion of the court has been erroneously exercised.

SAME.—*Absence of Attorney.*—A judgment will not be reversed because a postponement or continuance was refused on account of the absence at the trial of the principal or only attorney, unless it is made to appear affirmatively that some real injustice was probably done by such refusal.

SAME.—*Agreement of Parties.*—*Sanction of Court.*—An agreement by the parties thereto that a cause shall be postponed, does not operate as a postponement, without the sanction of the court, nor is the court bound by such an agreement.

CHANGE OF VENUE.—*Rule of Court.*—As a general rule, it is not error to overrule a motion for a change of venue made after the time fixed by a rule of the court within which such motions shall be made.

From the Clinton Circuit Court.

J. C. Blackledge, W. E. Blackledge and B. C. Moon, for appellant.

F. Cooper, for appellee.

NIBLACK, C. J.—This was an application by Martz Kempff to the board of commissioners of the county of Howard for a license to sell intoxicating liquors in a less quantity than a quart at a time in the town of Russiaville in that county. Section 5314, R. S. 1881.

Thomas M. Moulder remonstrated against the granting of a license to Kempff, upon the grounds that he had formerly been connected with the sale of intoxicating liquors at the place described in his application, and that during that time he and his partner in the business had kept a disorderly house; also, that on a day named he, the said Kempff, had been guilty of selling intoxicating liquors by retail without a license.

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The board of commissioners, after hearing the evidence, refused to grant a license. Kempff thereupon appealed to the Howard Circuit Court, where, upon his motion, the venue of the cause was changed to the county of Clinton. On the first day of the next term of the Clinton Circuit Court, which began on Monday, the 7th day of November, 1887, the cause was, in the absence of both Moulder and his counsel, set down for trial on the succeeding Monday, the 14th day of the same month. On the day following, that is, on the 8th day of November, 1887, H. C. Sheridan, one of Kempff's attorneys, who resided at Frankfort, in Clinton county, wrote to Blackledge & Brother, attorneys, residing at Kokomo, in Howard county, and who were leading counsel for Moulder, informing them as to the time at which the cause had been set for trial, and suggesting to them that if the time named would not suit them they had better see James F. Morrison, of Kokomo, Kempff's senior counsel, and get him to agree to some other time. Soon after the receipt of this letter Morrison, acting on the one side, and Blackledge & Brother, on the other, entered into an agreement in writing that the cause should be postponed and set for trial on Monday, the 21st day of the month named, and mailed it to Sheridan at Frankfort.

On Monday, the 14th day of November, 1887, B. C. Moon, of Kokomo, appeared in the Clinton Circuit Court as attorney for Moulder, and presented an affidavit made by James C. Blackledge, a member of the firm of Blackledge & Brother, stating that he had been and still was the principal attorney and counsellor of Moulder in the management of his defence; that his engagements in the Howard Circuit Court in the trial of causes were, at the time, such that it was impossible for him to prepare the cause for trial on that day; that, relying upon the agreement between Morrison and his firm for the postponement of the cause until the 21st day of that month, a statement of the circumstances which led to it having been submitted, and being restrained by engage-

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ments in other courts, the attorneys for Moulder had not caused the witnesses on his behalf to be subpoenaed, and had not prepared the cause for trial, and, in consequence, could not then try the same; that the affidavit was not made for delay merely, but that justice might be done.

Upon this affidavit Moon moved that the cause should be postponed until some future day, naming a day on which no cause was pending for trial, or be continued until the next term, but his motion was overruled, and he was required to at once proceed with the trial of the cause.

Moulder then filed his affidavit for a change of venue from the county, for the alleged reasons: First. That Kempff had an undue influence over the citizens of the county. Secondly. That an odium attached to his, the said Moulder's defence in the cause on account of local prejudice, but his application was overruled upon the ground that there was a rule of the Clinton Circuit Court which required applications for a change of venue to be filed at least one day before the day on which the cause was set for trial.

After hearing the evidence, the circuit court found in favor of Kempff upon all the matters necessary to sustain his application for a license, and, after overruling a motion for a new trial, gave judgment in his favor, concluding with an order that the auditor of Howard county should issue to him a license in accordance with his application.

The first question made in argument is upon the refusal of the circuit court to either postpone or continue the cause. It is conceded that the propriety of postponing or continuing, or of refusing either to postpone or to continue a cause, rests very largely in the discretion of the court, and that a judgment ought not to be reversed on account of a decision in respect either to a postponement or a continuance, except where it very clearly appears that the court's discretion has been erroneously exercised. But it is claimed that the case presented is one in which the discretion of the court was obviously abused.

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The absence of the principal counsel in a cause may justify its postponement or continuance, dependent upon the circumstances attending his absence, and his peculiar relation to the cause, but a judgment will not be reversed because a postponement or a continuance was refused on account of the absence at the trial of the principal attorney, or only attorney in the cause, unless it be made to appear that some real injustice was probably done by the refusal. It is not error to overrule a motion for postponement on account of the absence of the principal attorney where the party has other attorneys, unless it appears that he had not time to consult his other attorneys and to give them full information as to the nature of his case. 1 Works Pr., sections 738, 749; *Belck v. Belck*, 97 Ind. 73; *Eslinger v. East*, 100 Ind. 434.

A case may be postponed by the agreement of the parties, acting for themselves, or through their attorneys, and with the consent of the court, but an agreement by the parties that a cause shall be postponed does not operate as a postponement, without the sanction of the court, and does not of itself bind the court. A party is, therefore, not justified in assuming that a cause will be postponed simply because he has agreed with his adversary that it shall be. Nor is he authorized to assume that opposing counsel acted in bad faith because the court declined to sanction an agreement to a postponement. Neither is a defendant injured by the overruling of his motion to postpone, or by being deprived of an opportunity of summoning his witnesses, unless he has a meritorious defence, or his witnesses are material. Applying these general principles to the affidavit of Blackledge, we have no reason for either inferring or concluding that Moulder was injured in any material respect by being required to go to trial at the time the cause was tried. He was represented by counsel at the trial, made a defence and reserved exceptions, and, for aught that appears of record, he made as good a defence as he would have done if additional time had been given. There is, therefore, no affirma-

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tive showing that Moulder was really injured by his failure to obtain further delay in going to trial. *Whitehall v. Lane*, 61 Ind. 93.

The next question argued is based upon the refusal of the Clinton Circuit Court to change the venue, on the application of Moulder.

Section 1323, R. S. 1881, directs that the courts shall adopt rules for conducting proceedings therein not inconsistent with the laws of this State, and it has been frequently held that, under the authority thus conferred, our courts may, by the adoption of an appropriate rule, regulate the time within which applications for changes of venue shall be made, and may overrule an application for a change of venue made after the time fixed by such a rule, on the ground that it comes too late. See 2 Works Pr., section 1273, and cases cited; *Krutz v. Griffith*, 68 Ind. 444; *Krutz v. Howard*, 70 Ind. 174; *Hays v. Morgan*, 87 Ind. 231; *Rout v. Ninde*, 111 Ind. 597; *Moore v. Sargent*, 112 Ind. 484.

Cases might arise in which a strict enforcement of such a rule would not be justified, but there is nothing in this case to make it an exception to the general rule announced as above. *Ringgenberg v. Hartman*, 102 Ind. 537.

The Clinton Circuit Court, consequently, did not err in overruling Moulder's application for a change of venue.

An exception was reserved below upon the sufficiency of the evidence to sustain the finding which was made by the court, but no argument has been submitted here in support of that exception.

The judgment is affirmed, with costs.

Filed Sept. 18, 1888.

Branch v. Faust.

No. 13,385.

BRANCH v. FAUST.

SUPREME COURT.—Practice.—Complaint Considered as a Whole When Objected to First in Supreme Court.—Where the sufficiency of a complaint, or any paragraph thereof, is challenged for the first time in the Supreme Court by assignment of error, the complaint will be considered as a whole, and the objection will not avail if there is one good paragraph.

SAME.—Special Finding of Facts and Conclusions of Law.—Omission of Signature of Judge.—Bill of Exceptions.—Where a purported special finding of facts and conclusions of law have been copied into the transcript, without the signature of the judge, they will not be considered part of the record unless brought into it by a bill of exceptions; and where there is no bill of exceptions, such finding will be regarded as a general finding.

From the Madison Circuit Court.

R. Lake and E. B. Goodykoontz, for appellant.

C. L. Henry and H. C. Ryan, for appellee.

ZOLLARS, J.—Appellant has assigned as errors that the third paragraph of appellee's complaint does not state facts sufficient to constitute a cause of action, and that the court below erred in its conclusions of law upon the facts specially found.

These assignments are met by counsel for appellee with the contention that error can not be assigned in this court that a single paragraph of a complaint does not state facts sufficient to constitute a cause of action, and that, as the special finding of facts and conclusions of law copied into the transcript are not signed by the judge, and have not been brought into the record by a bill of exceptions, there is no question properly before this court for decision. This contention can not be disregarded without violating the provisions of the code, and the rules of practice long since settled by the decisions of this court.

There was no demurrer to the third paragraph of the com-

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plaint filed below. Its sufficiency is brought in question for the first time by an assignment of error in this court.

The code provides that by a failure to present objections to a complaint by a demurrer or answer, all objections thereto shall be deemed to have been waived, "except only the objection to the jurisdiction of the court over the subject of the action, and except the objection that the complaint does not state facts sufficient to constitute a cause of action." R. S. 1881, section 343.

Such an objection to a complaint may be made by an assignment of error in this court, but, like a motion in arrest of judgment, it challenges the complaint as a whole, and will not be available if in the complaint there is one good paragraph. So the above section of the code clearly provides, and so it has uniformly been interpreted. *Kelsey v. Henry*, 48 Ind. 37; *McCallister v. Mount*, 73 Ind. 559; *Trammel v. Chipman*, 74 Ind. 474; *Louisville, etc., R. W. Co. v. Peck*, 99 Ind. 68; *United States Ex. Co. v. Rawson*, 106 Ind. 215.

The clerk below has copied into the transcript what purports to be a special finding of facts and the court's conclusions of law thereon. Neither the finding of facts nor the conclusions of law are signed by the judge, and hence, under a long line of decisions by this court, they are not, and could not become, a part of the record unless brought into it by a bill of exceptions. There is no bill of exceptions. The finding by the court must, therefore, be regarded simply as a general finding in favor of appellee; and, as the evidence is not before us, we can not determine whether the finding and judgment are, or are not, erroneous. *Smith v. Davidson*, 45 Ind. 396; *Shane v. Lowry*, 48 Ind. 205; *Smith v. Johnson*, 69 Ind. 55; *McClellan v. Bond*, 92 Ind. 424; *Conner v. Town of Marion*, 112 Ind. 517.

Judgment affirmed, with costs.

Filed Sept. 18, 1888.

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The State v. The Wabash Railway Company.

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No. 14,283.

THE STATE v. THE WABASH RAILWAY COMPANY.

CRIMINAL LAW.—*Corporation in Hands of Receiver not Liable Criminally for Acts of the Latter.*—Where a corporation is in the hands of a receiver, who has full possession of its property and entire charge of its affairs, such corporation can not be prosecuted for crimes or misdemeanors committed by the agents or servants of the receiver.

From the Huntington Circuit Court.

E. C. Vaughn, Prosecuting Attorney, *B. M. Cobb* and *C. W. Watkins*, for the State.

C. B. Stuart and *W. V. Stuart*, for appellee.

ELLIOTT, J.—The record shows that the Wabash Railway Company is in the hands of a receiver appointed by the circuit court of the United States, and that the servants of the receiver constructed a platform across what had once been a public street, but which, it is claimed, had been vacated. It is only necessary for us to decide, that where a corporation is in the hands of a receiver, who has full possession of its property and entire charge of its affairs, the corporation can not be prosecuted for crimes or misdemeanors committed by the agents or servants of the receiver. As the corporation can do no act while the receiver is in full control, it can commit no offence. This seems so clear as not to require discussion. *Ohio, etc., R. R. Co. v. Davis*, 23 Ind. 553 (85 Am. Dec. 477); *Bell v. Indianapolis, etc., R. R. Co.*, 53 Ind. 57.

We need not inquire or decide whether a corporation is liable to a criminal prosecution for the acts of its agents or servants in obstructing a highway, for here the wrong charged against the corporation was not committed by the corporation, but by an officer of the Federal court placed in charge of the corporate affairs.

Judgment affirmed.

Filed Sept. 18, 1888.

The State v. Johnson *et al.*

No. 14,510.

THE STATE v. JOHNSON ET AL.

CRIMINAL LAW.—*Leasing Fair Grounds for Gambling Purposes.*—*Liability of Directors.*—*Indictment.*—An indictment which charges that the defendants, acting as officers, managers and directors of an agricultural society (naming it), which is a society organized under the laws of the State, did, on, etc., unlawfully rent, lease and donate a portion of the premises and grounds used and occupied by said society to one M. to be used for the purpose of carrying on a game of chance, with wheel of fortune, and dice, devices for the purpose of wagering money, is sufficient, on motion to quash, to charge an offence under the provisions of the act of April 4th, 1885. Acts 1885, p. 127.

From the Knox Circuit Court.

J. C. Adams, Prosecuting Attorney, for the State.

W. H. De Wolf, S. N. Chambers and E. H. De Wolf, for appellees.

MITCHELL, J.—At the January term, 1888, of the Knox Circuit Court, the grand jury returned an indictment in which they informed the court that Thomas Johnson and six others named therein, acting as officers, managers and directors of the Knox County Agricultural and Mechanical Society of Knox county, in the State of Indiana, which is alleged to be a society organized under the laws of the State of Indiana, did, on the 10th day of October, 1886, unlawfully rent, lease, and donate a portion of the premises and grounds owned, used and occupied by the above named society, to one Adam Marsh, to be used for the purpose of carrying on a game of chance, with wheel of fortune, and dice, devices for the purpose of wagering money, etc.

The court sustained a motion to quash the indictment, and upon this appeal, taken by the State, the propriety of this ruling is presented.

An act of the General Assembly, approved April 4th, 1885, Acts 1885, p. 127, makes it unlawful for any officer or

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officers, or any manager, director or trustee of any county fair, agricultural society or joint stock association, or of any fair, agricultural joint stock company or association, organized under the laws of this State, to rent, lease, let or donate any portion of the premises or grounds or any booth, stall or tent owned, used, leased or occupied by any fair, society, etc., to any person, etc., to be used for the purpose of carrying on any game of chance or skill, or any scheme, lottery or drawing, with dice, cards, balls or wheels, or any other device for the purpose of wagering money, etc. The act prescribes a penalty of twenty-five dollars against any officer or officers who violate any of its provisions.

The first objection urged against the indictment, in the brief filed on behalf of the appellees, is, that it is not alleged therein that the Knox County Agricultural and Mechanical Society is a county fair, agricultural society or joint stock association. It is said the statute only makes gambling unlawful on grounds owned, used or occupied by a society organized for agricultural purposes, and that because the indictment fails to charge that the society of which the defendants were the officers and managers, was organized for the purposes above named, it charges no crime. We do not concur in this view.

The statute makes it unlawful for any officer or officers of any agricultural society or joint stock association to rent or donate any portion of the grounds owned, used, leased or occupied by such society for gambling purposes. The indictment charges that the defendants were the officers of an agricultural and mechanical society, organized under the laws of this State, and that as such officers they did, on a day named, unlawfully rent, etc., ground owned by such society, for gambling purposes. It is wholly immaterial whether the society of which the defendants were the officers and managers was organized for one purpose or another. It was organized under the law of the State of Indiana, and was called an agricultural and mechanical society. Its off-

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cers incurred the penalty of the law when they leased or donated, if they did lease or donate, any portion of the grounds of the society for gambling purposes, if they leased it with knowledge that it was to be so used.

In support of the second and only other objection it is contended, on behalf of the appellees, that the indictment is bad for uncertainty, in that the charge is that the defendants "as officers, managers and directors" of the Knox County Agricultural, etc., Society, did unlawfully rent, etc. It is said that the statutory penalty is denounced only against any "officer or officers" who violate any of the provisions of the act, and that managers, directors and trustees are not included in the penal clause. If this were conceded to be a correct construction of the act, the description of the defendants as officers, managers and directors would not vitiate the indictment or make it bad for uncertainty. "Managers and directors" would be treated as surplusage merely. The words "officer" and "officers," as used in the act under consideration, were not, however, employed in a strictly technical sense. They were intended to designate any person or persons duly invested by the society with authority to grant privileges to other persons upon its grounds or premises, and to make it unlawful and penal for such persons intentionally to rent or donate any portion of the society's grounds for gambling purposes, with knowledge that they were to be so used.

Our conclusion is, that the court erred in sustaining the motion to quash.

The judgment is reversed.

NIBLACK, C. J., took no part in the decision of this cause.

Filed Sept. 19, 1888.

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No. 13,482.

DUNKLE ET AL. v. HERRON, TREASURER, ET AL.

CONSTITUTIONAL LAW.—*Section 7, Act March 8th, 1883, Constitutional.*—Section 7 of the drainage law of March 8th, 1883 (Acts 1883, p. 180), was a constitutional and valid enactment.

STATUTE.—*Repealing Section of Act of April 6th, 1885.—Saving Clause.—Drainage.*—Under the repealing section of the drainage act of April 6th, 1885, which repealed the act of March 8th, 1883, all assessments for work done under the latter act were unaffected by the repeal, and were enforceable according to the provisions of the law under which they were made.

From the Montgomery Circuit Court.

T. H. Ristine and *H. H. Ristine*, for appellants.

P. S. Kennedy and *S. C. Kennedy*, for appellees.

HOWK, J.—The only error assigned by appellants, plaintiffs below, upon the record of this cause, is the sustaining of the demurrer to their complaint. In their complaint, plaintiffs alleged that they were the owners of certain real estate, in Madison township, Montgomery county, Indiana, and were citizens of such county, and were the same persons mentioned in a certain pretended statement of assessments of benefits to certain lands therein described, which said statement of assessments was in the words and figures following, to wit: (Statement omitted). Plaintiffs further averred that, in the years 1869 and 1870, the Lye Creek Drainage Association, organized under the act of May 22d, 1869, to authorize and encourage the construction of levees, dikes and drains, and the reclamation of wet and overflowed lands, by incorporated companies, constructed in said Madison township a ditch or drain, a certain tributary of which was known as the Hudson tributary of the Lye Creek ditch; that said tributary was constructed according to certain plans and specifications, of a certain width and depth, and the lands adjoining and benefited by such work were assessed in sums

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sufficient to construct said work ; that afterwards, in 1884, defendant Washburn, as trustee of said township, employed an engineer for the purpose of repairing said ditch ; that said engineer made a survey of said old ditch, and established a grade and set grade-stakes ; that the repairs so made on said ditch were of a character to enlarge and widen the ditch as originally made ; that, in accordance with the survey so made, he contracted for the repairs and enlargement of said work at the sum of \$1.25 per rod, and in accordance with said contract he cut and cleaned out two hundred and seventy-seven rods of said ditch, which was but a part of the work contracted for by the said township trustee on said ditch ; that the work of cleaning and repairing said ditch could have been done at one-half of the expense if the same had been made of the same depth and width as originally constructed ; and that the work so done on said ditch was completed during the year 1884.

And plaintiffs further averred that, on or prior to the 6th day of April, 1885, no application had been made and no proceedings were pending in any court of this State for the construction of said work, and at that date no work was in course of construction on said ditch, but the same had been completed, and was made by said township trustee on his own motion and authority ; that afterwards, on the 17th day of December, 1885, long after the completion of said work, defendant Washburn, as such trustee, made out the pretended statement of the assessment of benefits by him upon the real estate which, in his opinion, was benefited by the work so done by him on said ditch, and filed such statement with the auditor of said county ; that such assessment of benefits included many tracts of land not assessed for the construction of said ditch as originally made and in no way benefited thereby ; that in pursuance of said pretended statement of assessment of benefits, and on no other authority whatever, the county auditor placed such assessments of benefits as special tax assessments on the tax duplicate of

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the county, and placed such duplicate in the hands of the defendant Herron, as treasurer of said county, for collection as other taxes; and that such special tax assessments were apparent liens on the lands of each of the plaintiffs. Wherefore, etc.

The question for our decision in this case may be thus stated: Are the facts stated by plaintiffs in their complaint herein, the substance of which we have given, sufficient to constitute a cause of action, or to entitle them to an injunction as against the defendants?

It is manifest from the averments of the complaint, that in the proceedings of which plaintiffs complain, the township trustee acted, or intended to act, under and in accordance with the provisions of section 7 of the drainage act of March 8th, 1883. In that section it was provided that, after the construction of any such work, the trustee of the township in which the same is, or any part thereof, should keep the same, or such part thereof, in proper repair and free from obstructions, so as to answer its purpose, and pay for the same out of the general township fund, and that to reimburse that fund he should apportion and assess the cost thereof upon the lands which would be benefited by such repairs or removal of obstructions, according to such benefits, in his judgment. Acts of 1883, p. 180.

In their brief of this cause plaintiffs' learned counsel earnestly insist that said section 7 of the drainage law of March 8th, 1883, was unconstitutional and void, and, therefore, did not authorize the acts and proceedings of the trustee of Madison township complained of herein. In support of their argument on this point, counsel cite and rely upon *Campbell v. Dwiggin*, 83 Ind. 473. The constitutionality of this section of the statute has been considered by this court in a number of recent cases, and it has been uniformly held that such section was a constitutional and valid enactment. *State, ex rel., v. Johnson*, 105 Ind. 463; *Fries v. Brier*, 111 Ind. 65; *Trimble v. McGee*, 112 Ind. 307; *Weaver v.*

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Templin, 113 Ind. 298. Adhering, as we do, to the doctrine of the cases cited, the constitutionality of said section 7 can not now be considered as an open question.

In the absence of any showing to the contrary, it must be assumed that the plaintiffs had full notice of the assessments made by the township trustee on their lands, in ample time to have appealed therefrom to the circuit court of Montgomery county, if they were aggrieved thereby. Upon such an appeal, if they had shown that the trustee, under color of making repairs or removing obstructions, had departed materially from the original specifications by widening and deepening the ditch, at an excessive cost, they might have defeated the assessments of benefits, at least to the extent of the excess of cost. *Weaver v. Templin*, *supra*. Not having appealed from the assessments of benefits of which they complain, as the statute provided they might appeal, we are of opinion that plaintiffs can not maintain this collateral suit to be relieved from such assessments.

The drainage law of March 8th, 1883, was repealed by section 13 of the drainage act of April 6th, 1885, after the work mentioned in the complaint was completed, and before the township trustee had filed with the county auditor a statement of his assessments of benefits on plaintiffs' lands. This repealing section contained certain provisos, but it is claimed that none of these provisos are broad enough to authorize the township trustee to make such statement of his assessments of benefits to the county auditor. The language of the provisos is somewhat obscure, but fairly construed it may be inferred therefrom, we think, that the Legislature intended that all assessments for work done under the laws thereby repealed, should be made and collected according to the provisions of such laws, and should not be affected by such repeal.

The demurrer to the complaint was correctly sustained.

The judgment is affirmed, with costs.

Filed Sept. 22, 1888.

No. 13,342.

BRIGHAM ET AL. v. HUBBARD ET AL.

SUPREME COURT.—*Practice.*—*Judgment not Reversed on Weight of Evidence.*

—A judgment will not be reversed on the weight of the evidence if there is evidence fairly tending to support it.

DEBTOR AND CREDITOR.—*Preference of Creditors.*—*Husband and Wife.*—A debtor in failing circumstances has a right to prefer some of his creditors, including his wife, as against others, and such preferences will be upheld, if untainted with fraud.FRAUDULENT CONVEYANCE.—*Husband and Wife.*—*When Court of Equity will not Interfere.*—Where a conveyance from husband to wife is attacked as fraudulent, a court of equity will not interfere to set it aside, where, by such action, no benefit can accrue to the creditors of the former.

From the Henry Circuit Court.

L. P. Newby and J. M. Morris, for appellants.*T. B. Redding and W. O. Barnard*, for appellees.

ZOLLARS, J.—In December, 1884, Charles S. Hubbard, appellee herein, conveyed real estate to his wife, his co-defendant below, and co-appellee here. Appellants, to whom he was indebted, subsequently instituted this action against him and his wife to set aside the conveyance as fraudulent as to them and his other creditors. The cause was tried by the court and resulted in a finding and judgment in favor of the defendants for costs.

Appellants contend that the judgment is not sustained by sufficient evidence. We have read all of the evidence carefully, and are well satisfied that the judgment can not be reversed by reason of its insufficiency.

It is so well settled by the decisions of this court that a judgment will not be reversed upon the weight of the evidence, if there is evidence fairly tending to sustain it, that it is not necessary to cite cases, nor, indeed, to re-state the rule. Here, the evidence not only tends to sustain the finding and judgment, but makes it quite apparent that the court

115	474
137	179

115	474
147	482

115	474
152	138

115	474
160	686

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below ruled correctly in awarding judgment in favor of appellees for costs. So far as shown by the evidence before us, Charles S. Hubbard, at the time of the conveyance to his wife, was indebted in the sum of about \$8,700. If the amount which he and his wife claim he was indebted to her is included, his total indebtedness was about \$9,400. Rating the property conveyed to the wife at the value placed upon it by appellants, the total value of his property at that time, above encumbrances, was near \$8,000. He was unable to pay his debts at that time—was insolvent. But, notwithstanding that fact, we think that the evidence fails to show that his purpose in making the conveyance to his wife was to defraud his creditors. In the conveyance to her, as in other conveyances made soon afterwards, he preferred some of his creditors as against appellants, but he seems to have been engaged in an effort to pay his debts so far as possible. For example, one piece of property, worth about \$600, he conveyed to a creditor to whom he was indebted in that amount. He mortgaged his stock of boots and shoes, of the value of about \$5,000, to other creditors to whom he was indebted in that amount. The stock went in payment of those debts. His real estate in Indianapolis was already under mortgage. What became of it is not shown. The probability is that the mortgagees finally took it. At least, he is not shown to have done anything dishonest as connected with it. He had a right to give a preference to some of his creditors, including his wife, as against others, and such preferences will be upheld, if untainted with fraud. *Grubbs v. Morris*, 103 Ind. 166; *Hoes v. Boyer*, 108 Ind. 494; *Proctor v. Cole*, 104 Ind. 373.

If it should be conceded that Hubbard had a fraudulent intent in the conveyance to his wife, there is no evidence at all that she had any notice of such intent. As already stated, at the time of the conveyance to her, he was engaged in selling boots and shoes, and had a stock of the value of \$5,000. She testified that she knew that he was indebted to .

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Frank White, but there is no evidence that she knew the amount of the indebtedness, or had any suspicion, even, that he was not able to pay it at any time. She was settled in the belief that he had ample means with which to pay all of his debts. We have not been cited to the evidence, and, after a diligent search, have been unable to find any that he was indebted to Frank White in any amount. But if there was such an indebtedness, and she knew of the amount, that alone would not overthrow the conveyance to her. The debt from Hubbard to her being *bona fide*, she had a right to accept a preference. *Dice v. Irvin*, 110 Ind. 561; *Cornell v. Gibson*, 114 Ind. 144.

Hubbard knew that he was insolvent, and in making the conveyance to his wife doubtless intended to give her a preference, as he subsequently preferred other creditors. The conveyance to Mrs. Hubbard seems to have been first suggested by Mr. Butler, a brother-in-law, who was Hubbard's attorney, and knew of his insolvent condition. He suggested to her that she had better have a deed for the property, as she had no security for the amount which her husband owed her, but he did not inform her of her husband's insolvency. He also suggested the matter to Hubbard, and wrote the deed, which was soon after executed.

It is contended by appellants that the price paid by Mrs. Hubbard was inadequate, and that such inadequacy is an evidence of fraud. We do not think so.

In 1857 Mrs. Hubbard received \$200 from her father. In 1861 she received the further sum of \$100 from him. These sums she turned over to her husband to be used in the construction of the house which was included in the conveyance to her from her husband. It was so used. After her father's death, in 1876, she received \$422 from his estate. Of that amount she again turned over to her husband \$122, to be used in repairing the property, and it was so used. For the balance—\$300—he gave her his note, drawing six per cent. interest.

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It is not necessary for us to decide whether or not Mrs. Hubbard could have coerced a payment to her by her husband of the amounts thus used in the construction and repair of the house, nor whether or not there was such a moral obligation to pay it resting upon the husband as would have afforded a good consideration for the conveyance to her. See *Sedgwick v. Tucker*, 90 Ind. 271, and cases cited; *Proctor v. Cole*, 104 Ind. 373.

If the sums thus used in the construction and repair of the house, with interest thereon, should be charged against Hubbard as a debt due to his wife, his indebtedness to her was at least \$700, as she testified it was, at the time the deed was executed. But it is not necessary to charge him with those sums in order to uphold the conveyance, and hence we do not decide the questions above suggested.

So far as concerns the number of witnesses, the preponderance of the evidence is that the property conveyed to Mrs. Hubbard was not worth over \$1,000, if, indeed, that much. In support of the judgment, it ought to be assumed that the court below found that the property was not worth over \$1,000. The note for \$300 was made in 1876. The conveyance was made in December, 1884. From the date of the note to the date of the conveyance, was about eight years. Two years interest had been paid. There was, therefore, about six years interest due which amounted to about \$108, making the total amount due upon the note about \$408. That was the amount which Mrs. Hubbard paid for the property, leaving out of the calculation the other sums above mentioned. The difference between the amount thus paid, and the value of the property, was \$592. But it must be remembered that, under our statute, the wife's one-third interest in the real estate could not have been subjected to sale, and that upon the sale of the property upon execution in satisfaction of the husband's debts, and the making of the deed in pursuance of such sale, she would have been entitled to claim the one-third in severalty. Two-thirds of the prop-

Brigham et al. v. Hubbard et al.

erty only, therefore, was subject to sale upon execution in satisfaction of Hubbard's debts. Two-thirds of \$1,000 is \$666.66. Hubbard was a married man and a householder, and as such, under our statutes, was entitled to hold as exempt from execution property of the value of \$600. Had the property conveyed to his wife been offered for sale upon execution as his property, he could have claimed from it, or out of the proceeds of it, \$600. In ascertaining, therefore, how much of his property subject to sale upon execution really passed to his wife by the conveyance to her, her one-third interest and the amount exempt by law from execution must be deducted from the value of the real estate thus conveyed. Adding the wife's one-third, \$333.33, to the amount exempt from execution, and we have \$933.33. There would thus be left subject to sale for Hubbard's debts only \$66.67 in value. That would have been all that his creditors could have reached and held as against the wife's interest and Hubbard's claim for an exemption.

An execution had been issued against Hubbard's property prior to the institution of this action, and was levied upon the personal property which he then owned. He claimed his exemption, and the whole of the property so levied upon, amounting to \$319 in value, was set off to him. Assuming that if the conveyance to his wife had not been made, the real estate so conveyed would have been taken under an execution, and that Hubbard would have claimed his exemption from the personal property, as he did, he would still have been entitled, and would yet be entitled, to claim from the real estate the difference between \$600 and \$319, the value of the personal property so set off to him. He would thus have been entitled, and would yet be entitled, to claim from the real estate \$281 in value. That amount added to the wife's one-third would make \$614.33 to be deducted from \$1,000, the value of the real estate, in order to ascertain just how much was placed, or was attempted to be placed, beyond the reach of creditors by the conveyance to the wife. The

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difference between \$1,000 and \$614.33 is \$385.67. Upon the assumption last above, that amount, and that only, the creditors could have reached by legal process had no conveyance been made to the wife.

Without any question, she paid more than that sum for the real estate by the surrender of her note for \$300 and the accumulated interest, amounting in all to about \$408.

It will thus be seen, also, that no possible benefit could accrue to the creditors should the conveyance to Mrs. Hubbard be set aside. When such is the case a court of equity will not interfere. *Smith v. Selz*, 114 Ind. 229.

It is suggested, rather than argued, that the court below erred in admitting certain testimony by Charles Butler. As already stated, he was a brother-in-law of the appellees, and the attorney for Hubbard. In response to a question by counsel for appellee he was allowed to state that prior to the execution of the deed to Mrs. Hubbard he suggested to her that, as her husband was indebted to her, she had better have a deed from him for the property here in dispute. Without examining the question further, it is entirely sufficient to say that the same conversation between Butler and Mrs. Hubbard was drawn out by appellants upon the cross-examination of Mrs. Hubbard. They are, therefore, in no condition to object to appellees bringing forward the same evidence in the examination of Butler. Nor could they have been injured by a reproduction of the facts which they had thus voluntarily elicited in the cross-examination of Mrs. Hubbard.

Having found no error in the rulings of the court below, the judgment is affirmed, with costs.

Filed Sept. 21, 1888.

No. 13,161.

TOWNS ET AL. v. SMITH ET AL.

TRIAL BY JURY.—*Not Allowable When any Essential Part of Cause of Action is of Equitable Cognizance.*—Where any essential part of a cause is exclusively of equitable cognizance, the whole is drawn into equity, and a demand for a jury in an action on a promissory note, and to set aside an alleged fraudulent conveyance, should be refused.

FRAUDULENT CONVEYANCE.—*Action to Set Aside.*—*Insolvency of Debtor Must be Shown.*—In an action to set aside a conveyance by a debtor as fraudulent, where there is no specific lien on the property conveyed, and no return of *nulla bona* on an execution issued, it is essential that proof should be made that the grantor debtor was insolvent, and that he did not have other property subject to execution at the time he made the deed which is assailed.

SAME.—*Evidence.*—*How Insolvency of Debtor May be Proved.*—*Practice.*—In such cases, courts of equity do not generally set aside conveyances made by a debtor until the creditor has exhausted all his legal remedies for the collection of his debt; but where it appears that the debtor has fraudulently conveyed all his property subject to execution and that the ordinary legal processes would be futile, it is not required that the creditor shall resort to useless formalities or unavailing remedies.

SAME.—*Evidence.*—*Tax List Admissible.*—*Purpose of Admission.*—Where the amount of property owned by a party is in controversy, a tax list returned by him to the assessor, under oath, purporting to give a full list of all his personal property, etc., is admissible in evidence against him, for the purpose of showing the particular articles of personal property, etc., owned or claimed by him at the time of such return, and to impeach his testimony given at the trial.

From the Huntington Circuit Court.

J. B. Kenner, J. I. Dille and L. L. Simons, for appellants.
J. C. Branyan, M. L. Spencer and W. A. Branyan, for appellees.

MITCHELL, C. J.—This suit was brought by Elizabeth Smith, her husband joining, to recover a personal judgment against William R. and Hiram Towns, on a promissory note, executed by the defendants, as joint makers, payable to the plaintiff. Elizabeth Towns was made a party defendant to answer concerning an alleged voluntary and fraudulent con-

115	480
121	469
115	480
126	476
115	480
131	470
132	484
133	426
115	480
136	693
115	480
137	285
115	480
146	296
115	480
150	415
115	480
160	238
115	480
164	451

Towns *et al.* v. Smith *et al.*

veyance of real estate made to her by her husband, Hiram Towns, with the intent to defraud the creditors of the latter. Prayer for a judgment against William R. and Hiram Towns, and for a decree setting aside the conveyance to Mrs. Towns, and that the property be subjected to the judgment. There was a judgment for the amount of the note, and a decree according to the prayer of the complaint.

It is made a question whether the court erred in refusing to submit the case to a jury generally, as an action at law.

The position of the appellant in that regard is not maintainable. One feature of the case, it is true, was an action on a promissory note, and the relief demanded was merely of a pecuniary character. To that extent the proceeding resembles an ordinary action at law. In order to obtain final and more effectual relief, however, the suit combined a proceeding in the nature of a creditor's bill to set aside and cancel a fraudulent conveyance, which belongs exclusively to the procedure and jurisdiction of chancery. It follows, under the rule which declares that if any essential part of a cause is exclusively of equitable cognizance, the whole is drawn into equity, that the present was a case of equitable jurisdiction. *Hendricks v. Frank*, 86 Ind. 278; *Lake v. Lake*, 99 Ind. 339; *Quarl v. Abbett*, 102 Ind. 233 (243).

The only other question presented is whether or not the evidence sustains the finding of the court.

It is insisted that the proof entirely fails to show that the defendant, Hiram Towns, was insolvent, and that he did not have other property subject to execution at the time he made the deed which is assailed as fraudulent, or at the time the suit was commenced.

In the absence of a specific lien upon the property transferred, or of a return of *nulla bona* upon an execution, it is essential to the maintenance of the judgment that such proof should have been made. *Brucker v. Kelsey*, 72 Ind. 51;

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Sherman v. Hogland, 73 Ind. 472; *Baker v. State, ex rel.*, 109 Ind. 47.

As a general rule, courts of equity do not interfere to set aside conveyances or transfers of property made by a debtor, until the creditor has exhausted all the remedies known to the law for the collection, and to obtain satisfaction, of his debt. Where it appears, however, that the debtor has fraudulently conveyed all his property subject to execution, and that the ordinary processes of the law would be futile, equity does not require that the creditor shall resort to mere useless formalities or unavailing remedies. *Eiler v. Crull*, 112 Ind. 318; *Mason v. Pierron*, 63 Wis. 239.

The evidence on the subject of Town's property at the dates in question, consisted of the latter's testimony before the court, and of his tax list, returned to the assessor under oath, on the 21st day of April, 1884, purporting to give a full, true and complete list of all personal property, etc., owned by him on the 1st day of April, 1884. The alleged fraudulent deed was made on the 12th day of April, 1884, and this suit was commenced June 19th, 1884. While the tax list was not competent as original, substantive evidence, to show the value of the property listed, it was competent against the lister for the purpose of showing the particular articles of personal property, or items of credits or taxables owned or claimed by him at the time the list was returned. It was also competent for the purpose of impeaching the defendant's testimony given before the court. According to the defendant's tax list, his entire taxable personal property on the 1st day of April, 1884, consisted of some agricultural tools and machinery of trifling value, a small amount of household furniture, two vehicles, three horses, one cow, and three hogs, the whole being valued at \$175. For the purpose of showing that he had sufficient property subject to execution to pay his debts, at the time the deed in question was made, and that the deed was hence not fraudulent as to his creditors, the defendant testified at the trial that

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he had a large amount of personal property, such as wheat, corn, oats, fifty tons of ice, set of butcher's tools, seventeen hogs, etc., in addition to that listed on his tax list. He gave no satisfactory account of the discrepancy between the amount or quantity of property listed and that claimed in his testimony. Now, while the court might not look at the tax list as original evidence to determine the actual value of the property listed, it could with great propriety look at that instrument for the purpose of determining what particular personal property the defendant owned on the 1st day of April, 1884. If the defendant gave a true list to the assessor of all the personal property owned by him on the 1st day of April, it is certain, taking the values of the property listed as fixed in his testimony before the court, that he had nothing but what was exempt from execution at the time he made the deed. The court had a right to believe that the defendant gave in all his personal property to the assessor. *Cincinnati, etc., R. R. Co. v. McDougall*, 108 Ind. 179; *Curme, Dunn & Co. v. Rauh*, 100 Ind. 247; *Painter v. Hall*, 75 Ind. 208; *Lefever v. Johnson*, 79 Ind. 554.

Assuming that the tax list contained a full, true and complete account of all the personal property owned by the defendant on the 1st day of April, 1884, and considering his testimony as given before the court from that stand-point, the finding of the court is sustained by the evidence.

As has been seen, it was competent for Towns to have explained the discrepancy between his tax list and his testimony, but so far as we can perceive he made no effort to do so. The court, therefore, believed that the property listed for taxation was all the property owned by Towns on April 1st, 1884. The presumption was also properly indulged, in the absence of countervailing proof, that his financial condition continued the same at the time the suit was commenced. *Adams v. Slate*, 87 Ind. 573. There was no error.

The judgment is affirmed, with costs.

Filed April 24, 1888; petition for a rehearing overruled Sept. 20, 1888.

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115	484
121	149
115	484
128	303
129	225
115	484
135	79
115	484
147	533
115	484
151	186
115	484
153	29

NEW TRIAL.—*As of Right.*—*Motion for.*—*Practice.*—*No Issue of Title Contemplated.*—*Motion to Vacate Order.*—Upon a motion for a new trial as of right, no issue can be formed involving title, nor does the statute contemplate the formation of any such issue upon a motion to vacate an order that has been made granting such new trial.

SAME.—*Judgment.*—*Sale of Real Estate While Action is Pending.*—Where, after judgment affecting the title to real estate, a party to the action is entitled to a new trial as of right under the statute, his adversary can in no way affect that right by making a sale of the land in controversy.

SHERIFF'S SALE.—*Ownership of Execution Defendant Not Terminated Thereby.*—*Consummation of Sale.*—*Lien of Purchaser.*—Where lands are sold at sheriff's sale the rights of the execution defendant as owner of such lands do not terminate until the sale is consummated by the execution of a sheriff's deed. He continues the owner until that time, as against the purchaser, subject to the lien of the latter, and may maintain an action to quiet title.

QUIETING TITLE.—*Judgment.*—*Sheriff's Sale.*—*New Trial as of Right.*—*Substitution of Party Plaintiff.*—Where, pending an action to quiet title, the land in controversy is sold at sheriff's sale as the property of the plaintiff, he may, notwithstanding, proceed with his action, and if judgment is rendered before a sheriff's deed is executed, he may have a new trial as of right under the statute; and after the granting of such new trial, and the execution of a sheriff's deed, the owner under such deed may, by proper application, be substituted as plaintiff, and prosecute the original action to final judgment.

NOTICE.—*Vendor and Purchaser.*—One who has notice of priorequities, but buys real estate from one who was a purchaser thereof in good faith, will acquire the same title as that of his vendor.

From the Allen Superior Court.

I. Stratton, for appellant.

R. C. Bell, S. L. Morris, R. S. Robertson and J. B. Harper, for appellee.

ELLIOTT, J.—On the 29th day of August, 1882, Morris Cody commenced this action to quiet title to a parcel of land. On the 6th day of March, 1883, and during the January

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term, the court entered a decree quieting the title of Morris Cody to part of the land claimed by him, and quieting title in the appellant in part of the land. No further steps were taken until October 2d, 1883, when Morris Cody filed a bond and obtained a new trial as of right. On the 16th day of November the appellant appeared and moved to set aside the order granting a new trial. The appellant at that time offered to show in support of his motion that, on the 7th day of June, 1883, after the expiration of the term of court at which the judgment was rendered, and before notice of any intention on the part of Morris Cody to apply for a new trial as of right, and while he was still prosecuting an appeal which he had prayed, the appellant sold the part of the land to which his title had been quieted to John Dirkson. Appellant also showed in support of his motion that, on the 22d day of July, 1882, all the interest of Morris Cody in the land was sold upon a judgment against him to Stephen A. Drew; that Drew, prior to the commencement of the action, had assigned the sheriff's certificate to Bridget Cody. The court overruled the motion of appellant. On the 15th day of March, 1884, Bridget Cody, the appellee, filed an affidavit showing title under the sheriff's sale, and was substituted as plaintiff.

The first point argued by counsel is, that the trial court was bound to set aside the order granting a new trial, because no notice was given by Morris Cody. This point is settled against the appellant by *Stanley v. Holliday*, 113 Ind. 525. That case gives a construction to section 1065 of the code directly against appellant's contention. Under the rule there declared, the order granting a new trial was valid, and it would have been error to vacate it upon the ground that notice had not been given.

The title of Morris Cody could not be tried or determined upon a motion to vacate the order awarding a new trial. He was entitled to a new trial as of right upon complying with the statute, and the appellant could not make any issue that

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would bring his title into controversy by a motion to set aside the order awarding a new trial. The statute does not contemplate the formation of any issue involving title upon a motion for a new trial as of right, nor does it contemplate the formation of any such issue upon a motion to vacate an order that has been made.

Morris Cody was the owner of the legal title to the land when he brought the action. The sale on the judgment against him did not make the purchaser the owner of the land. He had, therefore, a right to bring the action, although the claim of Drew, the purchaser at the sheriff's sale could not be cut off, but the claim of others might be. During the year allowed for redemption the purchaser at a sheriff's sale has, as said in *Bodine v. Moore*, 18 N. Y. 347, "no claim or right, except to be repaid the amount of his bid with the rate of interest prescribed in the statute." *State, ex rel., v. Sherrill*, 34 Ind. 57; *Neff v. Hagaman*, 78 Ind. 57 (63); *Felton v. Smith*, 84 Ind. 485.

When Bridget Cody obtained a deed the title vested in her, and related back to the date of the judgment. *Neff v. Hagaman, supra*; *Felton v. Smith, supra*; *Elliott v. Cale*, 80 Ind. 285. It was proper, therefore, to substitute Bridget Cody as the plaintiff.

The question in this case is not when the rights of Mrs. Cody, as the wife of Morris Cody, vested, but the question is, when did the rights of Morris Cody, as owner, terminate under the sheriff's sale?

It is clear, under the authorities cited, that his rights as owner did not terminate until the sheriff's sale was consummated by the execution of a deed. Until that time he was the owner, as against the purchaser, subject, of course, to the purchaser's lien on the land. We have here nothing to do with Mrs. Cody's marital rights, but what we are concerned with is Morris Cody's right to bring the action originally, and Mrs. Cody's succession to the title under the sheriff's sale.

Mrs. Cody does not, as counsel assume, prosecute this ac-

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tion as wife, widow or heir, but as the successor of the original owner. Her rights arise out of the consummated sheriff's sale, and until her title became consummated, Morris Cody was the proper plaintiff, but when it became perfect, then she, as his successor in the title, had a right to be substituted as plaintiff, and as such to prosecute the action. She was not bound to begin a new action, but was entitled to be substituted in lieu of her grantor, out of whom the title had passed.

Morris Cody having given the bond and obtained a new trial, his successor, Mrs. Cody, was not bound to give a new bond or lose the rights which had been vested in him by the judgment awarding a new trial. The law having been once complied with and a new trial adjudged, the rights of the parties were fixed, and the substitution of a plaintiff did not vacate or vitiate the former judgment. That judgment was not a conditional one, but it was absolute. It was not simply a personal privilege granted Morris Cody, but a judgment that there should be a new trial of the cause. As the judgment directed a new trial of the cause, it was not annulled or impaired by the fact that Mrs. Cody was substituted as plaintiff.

The case of *Hasselman v. Lowe*, 70 Ind. 414, has no application to this case, for in that case the irregularities in the sheriff's sale were held (whether correctly or not we do not now inquire), to invalidate it, and it was decided that the assignee of the judgment debtor who bought the land was not such a purchaser as was entitled to protection. Here, there is no infirmity in the sale, and conceding, but not deciding, that *Hasselman v. Lowe, supra*, is sound, it has no bearing upon this case.

The theory of appellant that any one might safely buy before the award of a new trial, is unsound. Morris Cody had a right to a new trial, and his adversary, by making a sale of the part of the land awarded him, could not take that right away from Cody.

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If Mrs. Cody became the assignee of Drew, the purchaser at the sheriff's sale, she acquired a good title. Drew had a right to sell and she to buy, and if the former purchased in good faith at the sheriff's sale, he had a title which he might sell, even though Mrs. Cody might, had she been the original purchaser, not have been able to acquire a title because of notice of prior equities. The general rule is, that one who has notice of a prior equity will acquire the same title as that of his vendor, where the vendor is a purchaser in good faith. This is a familiar rule of equity and has often been enforced by this court. *Evans v. Nealis*, 69 Ind. 148; *Sharpe v. Davis*, 76 Ind. 17; *Trentman v. Eldridge*, 98 Ind. 525. Mrs. Cody, therefore, has the same title that her vendor Drew had, and that relates back to the judgment.

If Drew had a title under his purchase at the sheriff's sale, he had a right to sell, and it was his title, in all its force, that was acquired by Mrs. Cody. In all things her title is as good as that of the person from whom she acquired it, carrying to her all its incidents, that created by relation as well as all others.

The fourth paragraph of the appellant's cross-complaint sets forth many facts, and it is not clear on what theory it proceeds, but granting that appellant's counsel is right in assuming that it proceeds on the theory that there was a fraudulent combination between appellee, her husband and Drew, we think it insufficient. It is true that it charges the acts of the parties to be fraudulent, but it does not state facts showing the fraud, and it is well settled that epithets will not supply the place of facts. It does not charge that Morris Cody furnished Drew with the money to buy the land, but charges that the money was "furnished by one or both of the Cody's." If it was furnished by Mrs. Cody there was no fraud, for there was no reason why she could not rightfully furnish it. She might have purchased directly with her own money, had she chosen to do so, and there would have been no fraud. The judgment was valid, the sale legal, and there was no

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reason why Mrs. Cody might not have bought the land herself or furnished Drew with money to buy it. Bass, the execution plaintiff, had a right to enforce his judgment, and Mrs. Cody had a right to buy the land at sheriff's sale.

The fourth paragraph is, however, bad, for the reason that it does not show any title in the cross-complainant or his grantees. It does not show title, but relies for evidence of title solely upon the decree which was vacated by the order awarding a new trial. As we have seen, no valid title could be founded on that decree. *Dunnington v. Elston*, 101 Ind. 373.

We do not perceive that there was any material error in admitting in evidence the conveyance, described in the cross-complaint, of the appellant to Dirkson. If error at all, it was a harmless one.

We hold that it was competent, under the issues, for the appellee to prove that the appellant, and those claiming under him, had no title to the land and no interest in it. Indeed, she would not have been entitled to a general decree quieting title if there had been a valid outstanding lien on the land, for a suit to quiet title brings in issue all claims. *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 308; *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 581; *Ragsdale v. Mitchell*, 97 Ind. 458; *Farrar v. Clark*, 97 Ind. 447; *Green v. Glynn*, 71 Ind. 336.

We can not disturb the finding upon the evidence. Our conclusion is, that under the rules we have stated any other would have been clearly wrong.

Judgment affirmed.

ZOLLARS, J., did not participate in the decision of this case.

Filed Sept. 21, 1888.

No. 14,308.

JOHNSON, SURVEYOR, v. LEWIS.

CONSTITUTIONAL LAW.—Statute.—*Constitutionality of Section 10 of Drainage Act of 1885.*—Section 10 of the drainage act approved April 6th, 1885, is constitutional.

SAME.—Assessment.—Notice to Owner.—Legislative Power.—While the State Constitution sanctions no law under which a lien can be conclusively imposed on property without notice to the owner, affording him an opportunity to be heard in a competent tribunal, yet it is competent for the Legislature to prescribe the kind of notice, and the tribunal before which he may be heard.

From the Posey Circuit Court.

E. D. Owen, W. Loudon and — Leonard, for appellant.
G. V. Menzies and E. M. Spencer, for appellee.

MITCHELL, J.—Lewis complained of Johnson in the court below, and charged that the latter, as surveyor of Posey county, had theretofore entered upon the plaintiff's lands and repaired a certain public ditch, on account of the making of which repairs the defendant had assessed against the plaintiff's lands the sum of \$209. The gravamen of the complaint is, that the surveyor had made the repairs to the ditch and assessed the plaintiff's lands as above, without giving any notice whatever of his intention to make the repairs or assessment. This is assumed by the pleader to be an attempt to take, or impose, a burden or lien upon the plaintiff's land without due process of law. Prayer for an injunction. A demurrer to the complaint having been overruled, and the defendant refusing to answer, the court gave judgment according to the prayer of the complaint.

Section 10 of the act concerning drainage, approved April 6th, 1885, makes it the duty of the county surveyor to keep all ditches which may have been constructed within his county, for the purpose of drainage, under any law then or theretofore in force in this State, in repair, to the full dimensions as

115	490
115	530
117	3
115	490
130	582
115	490
141	697
115	490
144	282
115	490
154	202
154	619
115	490
163	616

Johnson, Surveyor, v. Lewis.

to width and depth as required by the original specifications, and to certify the cost thereof, including his own per diem, to the county auditor, who is required to draw his warrant to the persons to whom the money is owing.

In order to raise the money necessary to reimburse the county treasury, it is made the duty of the county surveyor to apportion and assess the cost of the repairs upon the lands adjudged by the court benefited by the construction of the ditch, in like proportion as benefits were originally assessed against such lands. He is required to make a record of such assessment, to be kept in his office, open to public inspection, and it is made his duty within five days after making such assessment to post up written or printed notices thereof in three public places in each township in which lands are assessed. Any person aggrieved may appeal from the assessment to the circuit court within twenty days from the time such notices are posted.

It will thus be seen that the statute does not require or make any provision for notice until after the repairs have been made, and the cost thereof apportioned and assessed against the lands of those benefited by the original construction of the ditch.

The learned court below held the complaint sufficient upon the theory, as we are advised, that section 10, above referred to, is unconstitutional, because it provides that the county surveyor may repair ditches and assess the cost of the repairs against the lands adjudged by the court to be benefited, without first giving notice.

Recent decisions of this court, in which the question thus made is considered, uniformly affirm the constitutionality of the section in question, so far as its provisions are involved in the case now before us. *State, ex rel., v. Johnson*, 105 Ind. 463; *Fries v. Brier*, 111 Ind. 65; *Trimble v. McGee*, 112 Ind. 307; *Weaver v. Templin*, 113 Ind. 298.

As bearing directly upon, and decisive of, the question before us, we quote from the opinion in the case last cited the

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following: "The question as to the necessity or expediency of repairing a public drain is not one to be tried in judicial proceedings, but is one committed solely to the discretion of the officer designated by law, so that, if it were conceded that the statute does not provide for a trial of that question, or for notice to enable the land-owner to meet it, the concession would not affect the validity of the law."

It is quite true that the Constitution sanctions no law under which a lien can be conclusively imposed upon property without first giving the owner notice, and affording him an opportunity to be heard in some tribunal competent to administer adequate relief, but it is also true that it is competent for the Legislature to prescribe the kind of notice and the time when it shall be given, as well as the tribunal before which the hearing may be had. *Garvin v. Dausman*, 114 Ind. 429.

The Legislature, as we have seen, has provided that repairs shall be made and paid for in the first instance out of the county treasury. It has provided for notice to the property-owner after the cost has been apportioned and distributed to the lands adjudged benefited, in proportion to the amount originally assessed. This is a mere mathematical calculation. After notice, an appeal is allowed to the circuit court, which is fully authorized to determine whether or not the amount expended was for repairs in fact, and whether the surveyor has proceeded in good faith, and in all respects according to law, in making the cost which has been apportioned to and assessed against the lands of the respective owners.

The complaint did not state facts sufficient to constitute a cause of action.

The judgment is therefore reversed, with costs.

Filed Sept. 20, 1888.

O'Haleran v. O'Haleran.

No. 13,228.

O'HALERAN v. O'HALERAN.

DECEDENT'S ESTATE.—*Proceeding by Administrator to Sell Land to Make Assets.—Resistance by Owners.—Claim.—Practice.*—In a proceeding by an administrator to sell real estate to pay alleged claims against the estate, the owner or owners of the real estate have the right, in order to protect it, to defend against the proceeding, and the claims upon their merits, notwithstanding they may have been allowed by the administrator.

From the Tippecanoe Circuit Court.

E. A. Greenlee, for appellant.

J. F. McHugh, R. P. Davidson and J. C. Davidson, for appellee.

ZOLLARS, J.—Patrick Reagan devised all of his real estate to his daughter, Catharine. Subsequent to his death, she died intestate, leaving the appellees herein, who were defendants below, her only heirs at law. After her death, appellant, upon his own application, was appointed administrator of Reagan's estate, and as such, and for the purpose of paying alleged debts, filed his petition for the sale of the real estate so devised to the daughter, Catharine.

Appellees answered, amongst other things, that at the time of his death Reagan owed no debts, and that the only claim against the estate is an allowance by appellant, as administrator, of a claim filed by his wife, which was and is without any foundation, Reagan never having been indebted to her.

The court below overruled a demurrer to the third paragraph of the answer, the substance of a portion of which is given above, and, upon the evidence adduced, dismissed appellant's petition. The evidence is not in the record, and hence no question is made as to its sufficiency.

The case is submitted upon the assignment that the court below erred in overruling the demurrer to the answer.

The pleadings are not, upon either side, as definite and cer-

O'Haleran v. O'Haleran.

tain as they ought to be, but we think they present the question argued by counsel, and that is, have the owners of the real estate, in order to protect it from sale by the administrator, a right to defend against, and show, if they can, that the claim filed by appellant's wife is not a proper and valid claim against the Reagan estate, notwithstanding its allowance by appellant as administrator?

Counsel for appellant claim that they have not that right in a proceeding like this, and that their only remedy is that provided by section 102 of the act of 1881 (R. S. 1881, section 2326), as amended by the act of 1883, Acts 1883, p. 157, section 13.

The precise question thus presented was before us for decision in the case of *Scherer v. Ingerman*, 110 Ind. 428, and we there held that in a proceeding by an administrator for the sale of real estate to pay an alleged claim against the estate, the owner or owners of the real estate have the right, in order to protect it, to defend against the claim upon its merits, notwithstanding it may have been allowed by the administrator.

We are satisfied that the conclusion there reached is the correct one, and adhere to it. No mention was made in that case of the amendment of 1883, but there is nothing in that amendment which at all affects the question which was there involved and is here involved. See, also, *Mackey v. Ballou*, 112 Ind. 198; *Hunter v. French*, 86 Ind. 320.

The court below did not err in overruling the demurrer to the third paragraph of the answer.

Judgment affirmed, with costs.

Filed Sept. 20, 1888.

Root, by next Friend, v. Burton, Sheriff, *et al.*

No. 13,174.

ROOT, BY NEXT FRIEND, v. BURTON, SHERIFF, ET AL.

JUDGMENT.—*Agreement of Parties.*—*Supreme Court.*—*Appeal.*—Where a judgment is taken, which is a specific lien on certain real estate, in pursuance of an agreement that no order of sale shall issue until an appeal pending in the Supreme Court from another judgment against the defendant shall be disposed of, and that the judgment first named shall be annulled in the event of a decision favorable to the defendant, on the merits of the cause appealed, but shall otherwise be collectible; and where afterwards such appeal is dismissed, without further agreement as to the judgment unappealed from, there is nothing in the original agreement which will prevent the collection of that judgment by the sale of the real estate upon which it is a lien.

From the Pulaski Circuit Court.

D. Turpie, N. L. Agnew, B. Borders and W. A. Van Buren,
for appellant.

J. C. Nye and R. A. Nye, for appellees.

MITCHELL, J.—On the 25th day of February, 1884, there was an action pending in the Pulaski Circuit Court, by means of which Harriet Barnett, as plaintiff, was seeking to enforce a lien for taxes against certain lands then owned by Kate H. Root, who was a party defendant to the pending suit. Issues having been duly joined, judgment was rendered in favor of the plaintiff, by agreement, for \$355.32, which judgment it was agreed should constitute a lien upon, and be enforceable against, the lands described in the complaint.

It appears that another judgment, involving the validity of other tax claims, had been rendered in the same court against Mrs. Root in favor of the same party, and that an appeal had been taken therefrom to this court, where the cause was pending at the date above mentioned. As part of the agreement, in pursuance of which the judgment first above mentioned was rendered, it was stipulated that no order of sale should issue on the second judgment until the pending

Root, by next Friend, v. Burton, Sheriff, *et al.*

appeal from the judgment first taken had been determined. It was further stipulated that if the cause appealed should be decided on its merits in favor of the appellant, Kate H. Root, then the judgment last taken should be null and void, and not collectible; but in the event the decision should be against Mrs. Root, then the judgment should be collectible by legal process.

The agreement was duly spread upon the order-book of the court, and the decree which followed directed the judgment to be enforced according to the "conditions and stipulations agreed upon."

Afterwards, on the 23d day of September, 1885, Mrs. Root paid Mrs. Barnett \$128, about half the amount of the judgment first rendered, and appealed from, and in consideration of the sum paid, the pending appeal was dismissed by mutual agreement. It was further agreed that the judgment should be assigned to Harry Bennett Root, the appellant in this case. No mention was made of the judgment last taken, and still remaining in the Pulaski Circuit Court, or of the agreement first above referred to, when the appeal was dismissed.

Subsequently an order of sale was duly issued upon the judgment last rendered, and placed in the hands of John S. Burton, sheriff of Pulaski county, directing him to make the amount of the judgment, taken in pursuance of the above mentioned agreement, by a sale of the land described in the decree.

The appellant, having succeeded to the ownership of the land by the death of his mother, brought this suit by his next friend to enjoin the sale. A demurrer was sustained to the complaint, and this ruling presents the only question for decision in the case.

It is contended in favor of a reversal of the ruling below, that by the terms of the agreement which became part of the decree, the collectibility of the judgment, now sought to be enjoined, was dependent upon a condition precedent, viz., a

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decision of the pending appeal against the judgment defendant. It is said, in effect, that at the time the condition was agreed upon, the event upon which the judgment was to become enforceable, viz., the decision of this court in favor of the appellee, was possible and practicable, and that the subsequent dismissal of the appeal at the request and with the consent of the appellee, upon a consideration paid by the appellant, in that case, rendered the event impossible. The conclusion is said to follow that the collection of the judgment can not now be enforced.

We can not adopt this view. The reasoning in appellant's behalf leads to the opposite conclusion. To begin with, the plaintiff took an unconditional judgment by agreement for \$355.32, which was declared to be a specific lien upon certain real estate described. One of the necessary legal qualities of a judgment or decree is, that it is collectible and enforceable by execution, or by a sale of the property upon which the judgment is declared to be a specific lien. Unless an execution or order of sale is stayed, as the law provides, or by mutual agreement, it goes as a matter of course upon the filing of a *præcipe*. By mutual stipulation, the order of sale, in the decree last taken, was to be withheld until the determination of a certain appeal taken by the defendant, Kate H. Root. Presumably the agreement to delay was for her benefit. It saved her the necessity of another appeal. The present judgment was to become null and void and not collectible in the event the decision upon the merits in the case appealed was favorable to Mrs. Root. Until that event happens the judgment manifestly continues operative and in force. Accepting as sound the proposition that if one for whose benefit a condition has been annexed to a contract, voluntarily waives the condition, or renders it impossible of performance, the parties are thenceforth remitted to their rights as they stood without the condition, and the conclusion follows, logically and inevitably, that, by voluntarily

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dismissing her appeal, Mrs. Root waived the stipulation or condition annexed to the decree, by making it impossible for the contingency ever to happen upon which the nullification of the judgment taken against her depended. The appeal can never be decided on its merits in favor of Mrs. Root, because she has dismissed it, and the time has expired within which another appeal can be taken. The solution of the matter must, therefore, be found in holding that the dismissal of the appeal, which could only be done by Mrs. Root, waived all the conditional features annexed to the judgment, and placed the parties in the same situation as if the decree had been originally unaccompanied by any agreement. *Tanner v. Smith*, 10 Sim. 410.

The agreement in pursuance of which the judgment was to become null and void, on condition that the pending appeal should be decided in favor of the appellant, must be considered as having been abandoned by mutual consent. *Evansville, etc., R. R. Co. v. Dunn*, 17 Ind. 603; *Byrne v. Rising Sun Insurance Co.*, 20 Ind. 103; *O'Donald v. Evansville, etc., R. R. Co.*, 14 Ind. 259; *Rush v. Rush*, 40 Ind. 83.

Of course, upon the assumption that the stipulation which accompanied the judgment was such that in order to render the decree enforceable, a decision favorable to the appellee in the case appealed was essential, the conclusion contended for by the appellee would follow. But the situation was exactly the reverse. It was necessary, in order that the judgment might become void and uncollectible, that the appellant should prosecute the pending appeal to a favorable result. When she failed in that, or voluntarily did that which made it impossible for her to succeed, the judgment became collectible and enforceable, *ex proprio vigore*. *Padgett v. State*, 93 Ind. 396.

The operative and essential part of the agreement annexed to the judgment was, that proceedings should be stayed thereon until the pending appeal in the other case was determined, and that a decision favorable to the appellant

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should nullify the judgment then taken. So much of the stipulation as recited that the judgment should become collectible in case of a decision adverse to the appellant, was, in legal effect, mere surplusage. A failure to render the judgment invalid and uncollectible, left it necessarily collectible.

The judgment is affirmed, with costs.

Filed May 28, 1888; petition for a rehearing overruled Sept. 20, 1888.

 No. 14,106.

DELHANEY v. THE STATE.

CRIMINAL LAW.—Supreme Court.—Judgment not Reversed if Evidence Tends to Sustain.—The Supreme Court will not reverse the judgment in a criminal case if the evidence fairly tends to sustain it.

SUPREME COURT.—Practice.—Evidence, Admission or Exclusion of.—Motion for New Trial.—Alleged errors in the admission or exclusion of evidence must be presented below by a motion for a new trial, or they will not be considered on appeal.

SAME.—Appeal.—Instructions to Jury.—A judgment will not be reversed because of the refusal of instructions, although they contain correct statements of the law, if the substance of them is contained in others given.

SAME.—When all the instructions given by the court are not in the record, the Supreme Court will presume that the jury was properly instructed, and that the court by its instructions gave the substance of all proper instructions refused.

SAME.—Criminal Law.—Bill of Exceptions.—Instruction.—In criminal cases, the only way by which instructions given or refused can be made part of the record is by embodying them in a bill of exceptions.

From the Wells Circuit Court.

C. M. France and *M. W. Lee*, for appellant.

E. C. Vaughn, Prosecuting Attorney, for the State.

115	499
117	279
115	499
130	472
115	499
147	12
115	499
150	392
115	499
157	446
115	499
161	208
115	499
169	507

Delhaney v. The State.

ZOLLARS, J.—Appellant was convicted upon a charge of burglary. His counsel contend that there is error in the record, in this:

1. That the conviction and judgment are not sustained by sufficient evidence;
2. That the court below erred in admitting certain evidence; and,
3. That the court below erred in refusing an instruction asked in behalf of appellant.

Counsel for the State meet the argument of counsel for appellant by contending, in the first place, that the record presents nothing for decision by this court.

What counsel for appellant claim is the record, is before us in two separate and detached portions. One portion, which, for convenience, we will call the first portion, is a transcript of the papers in the case, the entries by the clerk, etc., and contains, also, what appear to be instructions. The other portion, which we will call the second portion, is in the form of a bill of exceptions, and includes, apparently, the long-hand manuscript of evidence, but there is really nothing to show in an authentic manner that this evidence is, in fact, the evidence in the case as set out in the first portion.

However, we have examined the evidence, and, assuming that it is the evidence in the case, we can not reverse the judgment upon the weight of the evidence.

In a criminal case, in order to justify a conviction, the guilt of the accused must be established beyond a reasonable doubt. That is the rule to be enforced by the trial court. It has long been settled, that on appeal this court will not reverse a judgment in either a civil or criminal case, if the evidence fairly tends to sustain it. *Skaggs v. State*, 108 Ind. 53, and cases there cited; *Garrett v. State*, 109 Ind. 527; *Hudson v. State*, 107 Ind. 372, and cases there cited; *Wagner v. State*, 107 Ind. 71; *Kleespies v. State*, 106 Ind. 383.

Delhaney v. The State.

See, also, *Reynolds v. State, ex rel., ante*, p. 421; Gillett Criminal Law, section 1017.

In response to the contention on the part of appellant that the court below erred in admitting certain evidence, counsel for the State insist that no question is before this court, because such admission of evidence was not assigned as a cause for a new trial. In that they are correct.

It is settled by numerous cases that errors in the admission or exclusion of evidence, like any other errors occurring at the trial, must be presented below by a motion for a new trial, or they will not be considered by this court on appeal. *Frybarger v. Andre*, 106 Ind. 337; *Cline v. Lindsey*, 110 Ind. 337 (343), and cases there cited.

As already stated, appellant's counsel contend that the court below erred in refusing the fifth instruction asked by them in behalf of their client. Here, again, the question made is not before this court in such a manner as to authorize a decision, without disregarding settled rules of practice.

A judgment will not be reversed because of the refusal of instructions, although they may contain correct statements of the law, if the substance of them is embraced in others given. *Walker v. State*, 102 Ind. 502; *National Benefit Ass'n, etc., v. Grauman*, 107 Ind. 288; *Cline v. Lindsey*, 110 Ind. 337 (342), and cases there cited; *Stephenson v. State*, 110 Ind. 358, and cases there cited.

And, when all of the instructions given by the court are not in the record, this court will presume that the jury were properly instructed, and that the court, by its instructions, gave the substance of all proper instructions refused, and that, therefore, the party complaining was not injured by such refusal. *Garrett v. State, supra*; *City of Indianapolis v. Murphy*, 91 Ind. 382; Gillett Criminal Law, section 919, and cases there cited; *Ehlert v. State*, 93 Ind. 76; *Terry v. Shively*, 93 Ind. 413; *Ricketts v. Coles*, 97 Ind. 602.

As above stated, the clerk below inserted in the first portion of the record what seem to be instructions given by the

Lindley *et al.* v. The State, *ex rel.* Wells, Administrator.

court. They can not be regarded as a part of the record, for the reason that in criminal cases the only way by which instructions given or refused can be made a part of the record is by embodying them in a bill of exceptions. *Leverich v. State*, 105 Ind. 277; *Hollingsworth v. State*, 111 Ind. 289; *Brown v. State*, 111 Ind. 441; *Ford v. State*, 112 Ind. 373.

The record shows affirmatively that all of the instructions given by the court are not properly in the record. Therefore, assuming that the fifth instruction is properly before us, because embraced in the bill of exceptions, which we have called the second portion of the record, and conceding, without by any means deciding, that it states the law correctly, this court can not reverse the judgment on account of its refusal, because we must presume that it was covered by other instructions given by the court.

The record does not present any error upon which this court can predicate a reversal of the judgment.

Judgment affirmed, with costs.

Filed Sept. 26, 1888.

No. 13,818.

LINDLEY ET AL. v. THE STATE, EX REL. WELLS, ADMINISTRATOR.

DECEDENT'S ESTATE.—*Administrator.*—*Action on Bond.*—*Pleading.*—*Complaint.*—In an action by an administrator on the bond of his predecessor, a complaint is sufficient which shows that the former administrator received money from the sale of the real estate of his intestate, for which he has refused to account, and that he still has the money in his hands.

From the Orange Circuit Court.

Lindley *et al.* v. The State, *ex rel.* Wells, Administrator.

J. W. Buskirk, H. C. Duncan, W. Farrell and W. P. Throop, for appellants.

W. H. Martin, for appellee.

ELLIOTT, J.—The complaint of the relator is founded on a bond executed by Lindley as principal, and the other appellants as sureties. It is alleged that the appellant Lindley, as administrator, petitioned for an order to sell the real estate of his intestate; that he obtained the order sought, and that the bond in suit was executed and approved by the court. It is further alleged that “the said Hiram Lindley, as such administrator, proceeded to sell said real estate for a large sum of money, to wit, five thousand dollars; that the sales so made were by said administrator reported to the court and approved; that the said sum remains in the hands of the defendant Hiram Lindley.” It is also alleged that Lindley was removed from his trust and the relator appointed his successor, and that Lindley, “although often requested so to do, has failed, neglected and refused to account to the relator for the proceeds of said sale.”

It is our judgment that the complaint is sufficient, inasmuch as it shows that the former administrator received money from the sale of the real estate of his intestate for which he has refused to account, and that he still has the money in his hands.

The criticism of counsel upon the special finding is founded on a mistake. The finding not only states that the notes given for the purchase-money were paid, but it also states that the defendant Lindley is chargeable therewith. It further states that the whole amount with which Lindley is chargeable is \$4,928.85.

Judgment affirmed.

Filed June 23, 1888; petition for a rehearing overruled Sept. 20, 1888.

No. 13,647.

JONES v. JONES.

115	504
1166	679

DECEDENT'S ESTATE.—*Final Settlement.—***Notice.—***Jurisdiction.—***Collateral Attack.—**The filing of his final account by an administrator confers jurisdiction upon the court to hear all matters pertaining or incidental to the final settlement of the estate, and where notice has been given of such filing by the clerk, however defective in form, the action of the court in the final settlement and distribution of the surplus can not be attacked in a collateral proceeding.

SAME.—*Distribution of Surplus to Heirs.—***Practice.—**Jurisdiction over the subject of distribution of the surplus of an estate to the heirs results as an incident to the final settlement, without additional notice, and while issues may be formed upon adverse claims growing out of distribution, it is not essential that they should be.

From the Montgomery Circuit Court.

W. B. Herod and G. D. Hurley, for appellant.

T. H. Ristine, H. H. Ristine, P. S. Kennedy and S. C. Kennedy, for appellee.

NIBLACK, C. J.—Complaint by the appellant, Cornelius Jones, against the appellee, Oliver H. Jones, in four paragraphs.

The first paragraph was for the sum of five hundred dollars as money had and received for the use of the appellant.

The second averred that the appellee had, on the 14th day of December, 1881, fraudulently caused and procured the rendition of a judgment in the court below against the appellant assuming to establish the fact that he was the assignee of his, the appellant's, distributive share in his father's estate, which was then being settled, and which distributive share was of the value of two hundred dollars; that the appellant never at any time assigned his said distributive share in his father's estate to the appellee; that no paper or pleading had been filed in said court setting forth or alleging that such distributive share had been so assigned to the appellee; that

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the appellant had no notice whatever that the appellee claimed to be the assignee of, or to have any interest in, such distributive share; that the appellant was never notified to appear in court at the said final settlement of his father's estate, but the appellee fraudulently and wrongfully, and with the intent to cheat the appellant, procured the judgment hereinabove stated to be rendered.

The third charged that the appellant and appellee were brothers, both being the sons of one Daniel S. Jones, deceased, and that, as such sons, they were both heirs at law of their said deceased father, whose estate was finally settled on the 14th day of December, 1881; that upon the final settlement the administrator of such estate paid to the clerk of the court the sum of sixteen hundred dollars belonging to the heirs at law of said decedent, of which sum the appellant was entitled to receive one-eighth part as his distributive share, but that the appellee wrongfully, unlawfully, fraudulently and corruptly, and without notice to the appellant, and at a time when the court had no jurisdiction of the appellant, and without any authority whatever, procured a judgment to be rendered by the court making such final settlement, adjudging him to be entitled to receive the distributive shares of all the other heirs to the decedent's estate; that, in pursuance of such judgment, the appellee received the sum of two hundred dollars belonging to the appellant.

The fourth was in the form of a common count for an indebtedness in the sum of five hundred dollars, two hundred dollars being for money had and received for the use of the appellant, as stated in the first paragraph, and three hundred dollars being for real estate alleged to have been sold and conveyed to the appellee.

Demurrers were sustained to the second and third paragraphs of the complaint, and the appellee answered what remained of the complaint, in three paragraphs.

The first paragraph was in denial. The second set up the final settlement of the estate of Daniel S. Jones and an ac-

companying order of court adjudging the appellee to be entitled by assignment to receive the appellant's distributive share in the estate. The third gave in detail the alleged circumstances under which the appellant made the conveyance of his interest in certain real estate, for which the sum of \$300 was demanded.

Demurrers were overruled to the second and third paragraphs of the answer, and issue being joined, a trial resulted in a verdict in favor of the appellant for three hundred dollars. This verdict was, however, on the motion of the appellee, set aside, and a new trial was ordered.

Upon a second trial the verdict and judgment were in favor of the appellee.

Questions were reserved below, and are presented here, first, upon the rulings on the pleadings; secondly, upon the setting aside of the first verdict; and, thirdly, upon the refusal of the court to grant a new trial after the return of the second verdict.

As the merits of the controversy were more fully made to appear by the evidence than by the pleadings, we will first give a synoptical statement of the material facts established at the trial:

Daniel S. Jones, late of Montgomery county, died intestate, on or about the 1st day of July, 1880, leaving eight or nine children, to whom his estate, consisting of both real and personal property, descended. The appellant and appellee constituted two of these children. During the same month letters of administration were granted upon the estate to William H. Stewart. There came into Stewart's hands, as a part of the assets of the estate, several promissory notes executed by the appellant, aggregating the sum of \$954.92. About the 30th day of October, 1880, Stewart, the appellant and the appellee, and some of the other children of the decedent, had a meeting to consult about the business of the estate, at which an informal agreement was reached, to the effect that the appellant should convey to his brothers and sisters

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all interest in the real estate of their said late father, consisting of several small tracts or lots of land, and that Stewart should thereupon surrender to the appellant the notes so held by him as assets of the estate. The appellant, with his wife, accordingly, on the 1st day of November, 1880, executed to his said brothers and sisters a deed conveying to them all his interest in such real estate, and his notes were thereafter surrendered to him by Stewart. The appellant, nevertheless, claims that after the meeting with Stewart and others referred to, the appellee, as a further inducement to execute a deed conveying his, the appellant's, interest in the real estate in question, promised to pay him the additional sum of three hundred dollars, and this claim comprises a part of the demand for which this action is prosecuted.

On the 26th day of November, 1881, Stewart filed with the clerk of the Montgomery Circuit Court his account for final settlement of the estate, showing a balance in his hands for distribution in the sum of \$1,465.09, which was afterwards paid to the clerk to await the final order of the court in the premises. The clerk fixed the 14th day of December, 1881, as the day on which the account would be heard, and gave notice, as required by section 2390, R. S. 1881, to the creditors, heirs and legatees of the decedent to appear in court on that day and show cause why the account should not be approved, of the giving of which notice full proof was made before any action was taken on the account.

On the day last named the account was referred to a master commissioner, who reported that it was, in all things, correct, and recommended that Stewart be discharged from his trust; also, that the appellee had become the purchaser of the interests of all the other heirs at law in the estate, and had thus become entitled to receive the entire amount of money which had been paid to the clerk as above for distribution.

No objection being made either to the account or to the report of the master commissioner, the former was approved,

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and Stewart was discharged and the estate was declared to be finally settled. To this the following was added :

“ It is further ordered, adjudged and decreed by the court that Oliver H. Jones is the owner in his own right and by assignment of all the distributive shares of said estate, and the clerk of this court is hereby ordered and directed to pay over to him the said sum of fourteen hundred and sixty-five dollars and nine cents, deducting therefrom the fee of said master commissioner, taxed at \$2.50, and that he take his receipt for the same on the order-book of this court.”

In pursuance of this last named order, Oliver H. Jones, on the 2d day of January, 1882, received from the clerk the sum of \$1,462.59, the balance due on all the distributive shares referred to, and executed to him a receipt for the amount entered upon the proper order-book of the court.

The appellant afterwards set up a claim that he had never either sold or assigned his distributive share in the estate to the said Oliver H. Jones, and, on the 25th day of March, 1886, commenced this action to recover from the latter the amount of such distributive share, as well as the sum of \$300 demanded in payment for real estate as hereinabove stated. As to the claim for the distributive share, the action was instituted, and the appeal to this court is prosecuted, upon the alleged ground that the Montgomery Circuit Court had no jurisdiction to order its payment to the appellee, and that hence the order requiring the clerk to pay it to him was inoperative and void :

First. Because no petition or other pleading was filed by the appellee making a claim to such distributive share, which was necessary to confer jurisdiction over the subject-matter of such a claim.

Secondly. Because no notice was given to the appellant requiring him to appear and answer such a claim, or that such a claim would be made.

Thirdly. Because the appellant was not in any manner

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made a party to the proceedings which resulted in making the order.

These objections to the validity of the order under consideration are based upon the assumption that the filing of the account for final settlement did not confer upon the court jurisdiction to inquire into and to adjust any claim to a distributive share in the surplus of the estate, and that, in consequence, the notice given by the clerk requiring the heirs of the decedent to appear and show cause why the account should not be approved, could not have been construed to be also a notice to appear to proceedings having reference only to the surplus remaining for distribution after final settlement.

Section 2390, above referred to, is as follows: "Upon the filing of such account, the court, or clerk in vacation, shall fix a day in term, to be endorsed on the account, not less than three weeks from the date of filing, when the account will be heard, and shall cause notice to be given by the clerk to the creditors, heirs, and legatees of the deceased to appear in court on such day, and show cause why such account should not be approved; which notice shall be given by publication in some public newspaper published in the county in which the administration is pending, and by posting at the court-house door, for two successive weeks. If such account be filed for final settlement, such heirs shall be notified, in addition, to appear and make proof of their heirship to the estate."

Section 2391 provides that, upon the giving of such notice, the court shall, on the day fixed, proceed to hear the account, or may refer the same to a master commissioner for a hearing, where any person interested in the estate may appear and contest the correctness of the account.

Section 2392 further provides that, if the moneys on hand shall be sufficient to pay all claims against the estate and expenses of administration, and there remains no claim pending for allowance, and no debt due the estate for collection, the court shall enter an order for the final settlement of the

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estate, for the payment of unpaid claims, and the distribution of the residue to the heirs and legatees of the decedent.

By section 2406 a master commissioner is authorized to hear proof of heirship, or of other title to the surplus remaining for distribution.

It does not affirmatively appear by the record of final settlement read in evidence in this case that the notices published and posted by the clerk also notified the heirs of the decedent to appear and make proof of their heirship to the estate, but it is shown by that record that after the proofs of the notices given were presented, it was held by the court that the proofs were sufficient, and that notices had been published and posted as required by law.

The filing of his final account by Stewart conferred upon the Montgomery Circuit Court jurisdiction to hear and determine all matters pertaining or incidental to the final settlement of the estate, and the notices of the filing of the account read in evidence were sufficient to bring the appellant constructively into court, and to require him to take notice of the proceedings taken upon the account. Being thus constructively in court, he was chargeable with notice of all that occurred as incidental to, or as immediately connected with, the final settlement. No subsequent petition or pleading was necessary to give the court jurisdiction of the matter of the distribution of the surplus. Jurisdiction over that subject resulted as an incident to the final settlement, and the hearing of claims to the surplus of an estate is usually a very summary and informal proceeding. Issues may be formed upon adverse claims of that character, but in a jurisdictional sense it is not essential that they shall be.

As has been shown, the master commissioner in this case, when he reported upon the correctness of the final account, also reported that, in his own right, and as a purchaser from the other heirs, the appellee was entitled to receive the entire surplus of the estate.

The inference, therefore, ought to be, that both of the sub-

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jects mentioned in his report were referred to him for his examination by the court, and that he properly heard evidence concerning claims to the surplus in connection with other matters pertaining to the final account. Being constructively in court at the time the account was referred to the master commissioner, the appellant can not be heard to deny that he had notice of the proceedings before that officer.

If the notices given by the clerk were in fact defective in not notifying the heirs to appear and make proof of their interests in the estate, and if by reason of such defective notices the appellant was misled to his prejudice, these circumstances might have afforded good grounds for a review or a reversal of the order directing the appellant's distributive share in the estate to be paid to the appellee; but where some notice has been given, however defectively, and the court having jurisdiction of the subject-matter of the proceeding has held the notice to have been sufficient, the judgment which followed can not be attacked collaterally, either upon the ground that there was no notice, or that the notice was fatally defective. See *Kleyla v. Haskett*, 112 Ind. 515, and authorities cited.

The evidence, therefore, failed to establish the appellant's right to recover from the appellee any part of the money received by the latter from the clerk under the order of the court hereinabove set out. As regards the additional claim on account of the conveyance of real estate, the evidence was conflicting, and not at all conclusive in favor of the appellant.

As to that branch of the case, there was evidence fully sustaining the verdict returned at the last trial. We can not, consequently, disturb that verdict upon the evidence.

The evidence given at the first trial is not in the record. For that reason no available question is presented upon the setting aside of the verdict rendered at that trial.

The allegations of fraud and want of jurisdiction contained in the second and third paragraphs of the complaint were

too general, indefinite and uncertain to be effective as collateral attacks on the order directing the payment of all the distributive shares in the estate to the appellee. These paragraphs were, therefore, bad upon demurrer. *Mannix v. State, ex rel., ante*, p. 245.

It follows, from what we have said, that the second paragraph of the answer was sufficient as an answer to the first paragraph of the complaint. The third paragraph of the answer was nothing more than an argumentative denial of a part of the fourth paragraph of the complaint. If, therefore, the circuit court erred in overruling the demurrer to that paragraph, it was a harmless error.

Other questions were reserved at the trial, and have been referred to in argument, but the view we have taken of the questions already considered by us practically disposes of all remaining questions.

The judgment is affirmed, at the costs of the appellant.

Filed Sept. 26, 1888.

115	512
120	402
115	512
157	682

No. 13,376.

THOMPSON ET AL. v. PECK ET AL.

FRAUD.—*Sale of Personal Property.*—*Voidable Contract.*—*Rescission.*—*Remedy of Vendor.*—Although a sale of property is induced by fraud, the contract is not void but voidable upon the election of the vendor. He may elect to rescind the contract, by returning or offering to return whatever of value he may have received and reclaim his property, or he may retain the consideration and treat the bargain as subsisting.

REPLEVIN.—*When Maintainable for Goods Fraudulently Obtained.*—*Disaffirmance of Contract.*—*Vendor Must Restore Purchase-Price Received.*—While the commencement of an action to reclaim property, the possession of

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which has been obtained by fraud, is ordinarily a sufficient disaffirmance of the contract, where the vendor has received nothing of value, yet in case money has been paid, or the purchaser's notes have been received, replevin can not be maintained for the recovery of the property, while the vendor retains the money or notes for the purchase-price.

SAME.—*Strictly Law Action.*—*Bringing Notes Into Court.*—Replevin is strictly an action at law, in which the right of recovery must exist at the time the action is commenced. It can not be created by bringing notes into court as in an equitable suit for rescission, and offering to surrender them as the court may direct.

FRAUD.—*Fraudulent Conduct.*—*What Sufficient to AVOID Sale.*—To avoid a sale on the ground of fraud, after the goods have come fully into the possession of the buyer, apparently in the ordinary course of his business, it is not sufficient to show that the purchaser was insolvent when the goods or any of them were purchased, and that he knew his debts exceeded his assets. There must have been some artifice or trick, false pretence or fraudulent suppression of the truth, which enabled the purchaser to obtain possession, and it must also appear that he intended at the time not to pay for the goods.

From the Johnson Circuit Court.

G. M. Overstreet, A. B. Hunter, R. M. Miller and W. H. Barnett, for appellants.

S. P. Oyler, W. A. Johnson and Smith, Kellogg & Wells, for appellees.

MITCHELL, J.—This was an action in replevin to recover the possession of personal property, consisting of ready-made clothing of the alleged value of \$5,000, of which the plaintiffs claimed they were the owners and entitled to the possession, and which they charged that the defendant wrongfully detained from them to their damage, etc.

The complaint was in three paragraphs, and while the second and third assumed to set forth the particular manner in which the defendants obtained possession of the goods in controversy, they are nevertheless complaints in replevin, and in legal effect the same as the first paragraph.

It appeared that the plaintiffs were partners, doing a whole-

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sale or jobbing business in the city of Syracuse, New York, under the firm name of W. S. Peck, Bro. & Co., while the defendants, Dalmbert & Sergeant, were conducting a general retail store at Edinburgh, Indiana. The latter firm became customers of the former in 1882, after which they purchased bills of goods varying in amounts several times each year, generally at the solicitation of one of the plaintiffs, who was the travelling salesman of the firm.

The evidence tended to show that the plaintiffs sold the defendants a bill of goods on the 24th day of July, 1884, amounting to \$1,987, and that they sold them another bill in January, 1885, amounting to \$1,824, another of \$1,471.50 in July, 1885. For the bill sold in July, 1884, including some interest accrued on the account, the plaintiffs received three promissory notes, executed by the defendants, Dalmbert & Sergeant, payable in a bank in this State, for \$666 each, dated the 27th day of March, 1885, due in two, three and four months, respectively. Two of these notes were subsequently paid. The other has not been paid. For the goods sold in January, 1885, three notes were executed by Dalmbert & Sergeant, dated November 1st, 1885, due in two, three and four months, respectively. The bill sold in July, 1885, remained in an open account. On the 25th day of November, 1885, Dalmbert & Sergeant, finding themselves in failing circumstances, and unable to pay their debts, after having the day previous given a chattel mortgage on their stock, and otherwise secured several of their creditors, made a voluntary assignment under the statute for the benefit of all their creditors, the appellant Thompson being named in the deed as assignee.

They were indebted to the plaintiffs at the time of the assignment, their indebtedness being evidenced by one of the notes given in settlement of the July, 1884, purchase, and by the three notes given in settlement of the purchase made in January, 1885, and by the open account for the goods purchased in July, 1885. The plaintiffs asserted the right to re-

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cover all of the goods sold by them to Dalmbert & Sergeant, on either of the dates above mentioned, so far as such goods remained in the latter's possession, and were capable of identification at the date of the filing of the complaint, viz., December 5th, 1885, on the ground that the purchasers were hopelessly insolvent, and had no reasonable expectation of being able to pay, and did not intend to pay, for the goods at the time they were purchased. It appeared that the sheriff, in obedience to the command of the writ of replevin, had seized all the goods sold by the plaintiffs to Dalmbert & Sergeant which remained unsold at the time the suit was commenced. The goods seized were of the value, as found by the jury, of \$1,980. The evidence showed that of the goods seized, \$261 worth were of the July, 1884, purchase, \$538.54 of the January, 1885, purchase, and the residue of the last bill, purchased in July, 1885.

A jury having returned a verdict in favor of the plaintiffs, judgment was given accordingly, over a motion for a new trial. The verdict and judgment affirmed the right of the plaintiffs to recover the unsold goods remaining of each and all the several purchases as above described, notwithstanding the amount of the first two purchases had been settled by the giving of notes by the purchasers, payable in bank, two of which notes had been fully paid, with interest, and notwithstanding there had been no offer to return either the notes given, or the money paid, before the bringing of the suit in replevin.

The appellants contend: (1) That the evidence wholly fails to show that either of the purchases was made under such circumstances as justified a rescission of the contract and a reclamation of the goods; and (2) that even if it be conceded that the goods were fraudulently obtained, with a design not to pay for them, still replevin can not be maintained to recover those embraced by the first and second purchases, without first offering to return the money paid and the notes executed in settlement of the several accounts.

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The question embraced in the last proposition arises both on the evidence and upon an instruction given by the court, which instruction was to the effect that if a purchase of goods be effected by means of fraud, the vendor does not, as against the purchaser, lose his title to the goods, and the vendor, in case notes have been given for the purchase-price, may maintain replevin, without having previously tendered the notes, provided they are produced at the trial to be surrendered up.

Without determining whether or not the evidence in the record justifies the inference that Dalmbert & Sergeant knew of, and fraudulently concealed, their insolvency, if they were insolvent, at the time of each purchase, with the present purpose in each instance to obtain goods and not pay for them, it is sufficient to say, even if these points were conceded, a reversal of the judgment must follow nevertheless, because the case was allowed to proceed and was put to the jury upon a theory which can not be approved.

It is well settled that even though a sale of property be induced by fraud, the contract is not void, but only voidable. The title to the property passes to the fraudulent vendee, subject to the right of the vendor, upon discovering the fraud, to elect whether he will rescind the contract by returning, or offering to return, whatever of value he may have received, and reclaim his property, or whether he will retain the consideration and treat the bargain as subsisting. Until the vendor makes his election the contract continues and the title to the property remains in the purchaser as against all the world. *Powers v. Benedict*, 88 N. Y. 605.

Where the possession of property has been wrongfully obtained, by means of a voidable contract, and the vendor has received nothing of value, the bringing of an action to reclaim the property is ordinarily a sufficient disaffirmance of the contract. But in case money has been paid, or the purchaser's promissory notes have been received, replevin can not be maintained for the recovery of the property while the vendor retains the money or notes for the purchase-price.

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Moriarty v. Stofferan, 89 Ill. 528; *Deane v. Lockwood*, 115 Ill. 490; *Parrish v. Thurston*, 87 Ind. 437; *Haase v. Mitchell*, 58 Ind. 213.

“One who has been led into a contract upon which he has received something of value can not ignore the contract, however induced, and proceed in a court of law as if the relations of the parties were wholly unaffected thereby. He can not, while retaining its benefits, and thus affirming the contract, treat it as though it did not exist.” *Home Ins. Co. v. Howard*, 111 Ind. 544.

Replevin is strictly an action at law. The right of recovery must exist at the time the action is commenced. It can not be created by bringing the notes into court, as in an equitable suit for rescission, and offering to surrender them up as the court may direct. As has been seen, there were three separate bills, involving three distinct transactions, each one of which must stand upon its own merits and be governed by the circumstances peculiar to it. The first bill was purchased and the goods delivered more than sixteen months before the purchasers failed. Six months and more after the goods were delivered, the purchasers executed their negotiable promissory notes in settlement of the account. Two of these notes, with the interest, were afterwards paid, and all of the goods except \$261 worth had been retailed out before the suit in replevin was commenced. We have been cited to no authority, nor can we conceive of any principle which authorizes the vendors, after such a lapse of time and under such circumstances, to ignore the sale and maintain replevin for such of the goods as remained unsold while retaining the money and note which they received in pursuance of the contract. The plaintiffs can not affirm the contract so as to keep the money and note, and at the same time treat it as rescinded for the purpose of recovering so much of the property as remains.

The right to recover goods obtained by fraud, or in pursuance of a fraudulent contract, by an action at law, only

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exists while the situation of the parties remains such that they can be placed substantially in *statu quo*. If this can not be done, while the party defrauded is not remediless, some other remedy than replevin must be resorted to. *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75; *Gould v. Cayuga Co. Nat. Bank*, 99 N. Y. 333.

That the purchasers may have been insolvent when the first bill, or any of the other bills, was purchased, and that they may have known that their debts exceeded their assets, did not of itself constitute such a fraud as justified the setting aside of the sale after the goods had come fully and fairly into the possession of the buyers. To avoid a sale after goods have been taken into the possession of the buyer, apparently in the ordinary course of his business, there must have been some artifice or trick, or some false pretence or fraudulent suppression of the truth, which enabled the purchaser to obtain possession of the goods, and it must appear that the latter intended at the time of each purchase not to pay for the goods. And there must have been a complete restoration of whatever of value was received.

The mere fact that the purchasers subsequently executed chattel mortgages upon the property, thereby giving certain of their creditors preference, or that they made an assignment for the benefit of creditors, did not warrant the inference that either of the purchases was made with the design to obtain the goods without paying for them. *Gilbert v. McCorkle*, 110 Ind. 215.

Most of the goods covered by the January, 1885, purchase, had been sold in the usual course of retail by the purchasers before they made an assignment for the benefit of their creditors. The January bill had been settled months after it was made, by accepting the purchasers' promissory notes which were negotiable according to the law merchant. This was *prima facie* an extinguishment of the account. If under such circumstances replevin is maintainable at all,

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certainly it can only be after a tender of the notes and a rescission of the contract.

Since the judgment must be reversed for the reasons already given, we do not examine other questions raised and argued which can hardly arise again.

The judgment is reversed, with costs.

Filed Sept. 26, 1888.

No. 13,422.

WOOD v. LORDIER ET AL.

MORTGAGE.—*Execution of Two Mortgages on Same Day.—Priority.—Fractions of a Day.*—Where two mortgages are fully executed on the same day, but at different hours, the one first executed in point of time is entitled to priority of payment.

From the Allen Superior Court.

R. S. Robertson, for appellant.

J. Morris and *J. M. Barrett*, for appellees.

HOWK, J.—This was a suit by appellant, Wood, as plaintiff, against Mary A. Dustman, William R. Herrick, Frank Zwahlen, Wyrick France, August Lordier and Alexander McAllister, as defendants. The object of the suit was to foreclose a certain mortgage alleged to have been executed by defendant Dustman to the plaintiff on the 12th day of June, 1884, on certain real estate in Allen county, Indiana, and to collect the debt secured thereby. The other defendants above named were made parties to plaintiff's action, upon the alleged ground that they claimed to hold liens, by

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mortgages or judgments, upon the real estate described in the mortgage to plaintiff, which said liens, it was averred, were inferior in equity and subject to plaintiff's mortgage sued on herein. Afterwards, the plaintiff dismissed her action as to defendants France and McAllister, and all the other defendants, except August Lordier, made default herein. Defendant Lordier answered in two paragraphs, of which the first was a general denial of the complaint herein, and the second paragraph stated a special defence. Lordier also filed a cross-complaint herein against his co-defendant Dustman, and plaintiff Wood, wherein he averred that he was the owner and holder of two certain mortgages, executed by defendant Dustman on the same real estate described in the mortgage sued on herein by plaintiff, one to Wyrick France and the other to Alexander McAllister, both dated on the 11th day of June, 1884, and both assigned to said Lordier by endorsement, which said mortgages and the notes secured thereby were averred by the cross-complainant, Lordier, to be then due and unpaid, and prior liens to the lien of the mortgage to plaintiff sued on herein. Plaintiff replied to the second paragraph of Lordier's answer, and answered his cross-complaint herein, by general denials thereof, respectively.

The cause, being at issue, was submitted to the court for final hearing, and the court found for plaintiff in the sum due on the note described in his complaint, and for the cross-complainant, Lordier, in the sums due and to become due on the notes described in his cross-complaint herein, and "that the mortgages, described in plaintiff's complaint and said Lordier's cross-complaint, were executed on the same day, and were equal liens" on the mortgaged premises. The court rendered judgments for the plaintiff and the cross-complainant respectively, in accordance with its finding, and decreed that the mortgaged real estate should be sold, as other lands are sold on execution, and that the proceeds of such sale, after the payment of costs herein and accruing costs, should be applied to the payment, *pro rata*, of the respective

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judgments of the plaintiff and the cross-complainant, Lordier. Plaintiff's motion for a new trial having been overruled, she has appealed from the judgments and decree below to this court.

The only error properly assigned here by plaintiff is the overruling of her motion for a new trial. In that motion, the only causes assigned for such new trial were (1) that the finding of the court was not sustained by sufficient evidence, and (2) that such finding was contrary to law.

In his brief of this cause, plaintiff's learned counsel says: "The sole question in the case is whether, upon the facts, appellant's mortgage has priority over those mortgages set up by appellee Lordier, in his cross-complaint; or whether the latter mortgages are entitled in equity to share *pro rata* with plaintiff's mortgage in the proceeds of the sale of the mortgaged real estate, under and by virtue of the decree of foreclosure?" This question is fairly presented for decision by the record of this cause and the error assigned thereon; and it is apparent, we think, that it is the only question in the case, about which there was or could be any room for controversy, which was considered and decided by the court below. The evidence in the record, without any material conflict therein, fairly showed, we think, that Mary A. Dustman, who executed all the mortgages sued on herein, as well by the cross-complainant as by the plaintiff, had agreed, on the 11th day of June, 1884, to purchase a certain lot of Wyrick France, and a certain other lot of Alexander McAllister. These purchases could not be consummated by defendant Dustman, on the day named, because she did not then have the money required to make the cash payments agreed upon, on the lots purchased. On the next day, June 12th, 1884, in the forenoon of that day, she effected a loan from plaintiff, Hester A. Wood, for which she then gave her note in the sum of \$450, payable one year after date, with interest at the rate of eight per cent. per annum, and then and there executed and acknowledged the mortgage sued on herein by

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plaintiff, to secure the payment of such note. Of the moneys so loaned her by plaintiff, the said Mary A. Dustman then and there used the sum of \$275 in paying off and securing the satisfaction of a prior mortgage for unpaid purchase-money on the mortgaged real estate; and then the mortgage to plaintiff in suit herein was filed for record in the proper recorder's office.

After all these things had been done, and not before, the evidence further shows that said Mary A. Dustman used of the money so loaned her by plaintiff, the sum of \$75 in making the cash payment on the lot purchased by her from said McAllister, and the sum of \$50 in making the cash payment on the lot purchased by her from said France; and that she then and there, and not before, executed and acknowledged to said McAllister and France, respectively, the several mortgages assigned by them as aforesaid to the cross-complainant, Lordier, and described by him in his cross-complaint herein.

Without any room for doubt, as it seems to us, the foregoing facts are established by the evidence in this case, without any conflict therein. Upon these facts, plaintiff's learned counsel insists very earnestly that she, Hester A. Wood, is entitled in equity to payment in full of the amount found due her by the court below, out of the proceeds of the sale of the mortgaged real estate, before the cross-complainant, Lordier, can be permitted to share in any part of such proceeds. The court below ruled otherwise, and, upon the facts shown by the evidence, decided and decreed that the plaintiff and the cross-complainant herein were entitled in equity to share *pro rata* in the proceeds of such sale, after the payment of costs accrued and to accrue.

In the briefs of counsel, it is suggested that the court below ruled as it did upon the authority of *Cain v. Hanna*, 63 Ind. 408. In that case it was held that separate mortgages on the same real estate, executed by the mortgagor to several mortgagees upon the same day, to secure the pay-

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ment of debts having no priority, and recorded within time, though upon different days, have no priority. The court there said: "The mortgage * * * under which the appellees remotely claim, and the mortgage to the appellant under which he immediately claims, were both executed on the same day, by the same mortgagor, on the same real estate which is now in controversy, and were both recorded within time. There is, therefore, no precedence shown between them; neither is senior or junior to the other; both stand equal upon the same ground." It does not appear from the opinion of the court, in the case cited, that the two mortgages were executed at different hours on the same day. The opinion is wholly silent on that subject. If the execution of the two mortgages was fully consummated by the delivery thereof respectively, at the same precise time, then it was correctly held that neither of them had precedence or priority over the other. But if the two mortgages were fully executed at different hours, as, for instance, the one in the forenoon and the other in the afternoon of the same day, then it ought to have been held, we think, that the mortgage first executed in point of time was entitled in equity to priority of payment.

So it was recently held by this court, in the well considered case of *Gibson v. Keyes*, 112 Ind. 568. In that case it appeared that one Edward Green, on the 5th day of March, 1878, executed a mortgage on his farm to appellant's intestate, Andrew J. Carr, to secure the payment of a promissory note. On the same day, but two hours after the full execution of the mortgage to Carr, the same mortgagor, Green, executed another mortgage on the same farm to appellee, Keyes, to secure the payment of another promissory note. Upon the foregoing facts the appellant claimed that the mortgage to Carr was entitled to priority over the mortgage to Keyes. But the circuit court ruled otherwise, and decided that as the two mortgages were executed on the same day, and as the law does not recognize the fractions of a day, there

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was no priority in law or equity between such mortgages, and they were entitled to share *pro rata* in the proceeds of the mortgaged real estate. On appeal, this court reversed the judgment below, and remanded the cause for a new trial. In relation to the general rule, that "the law does not recognize fractions of a day," the court there said: "The authorities abundantly show, that for the purpose of settling conflicting claims and titles the hours of the day when the conveyances to the several claimants were made, may be shown. In other words, in the application of the maxim '*Qui prior est tempore, potior est jure*,' it may always be shown upon what day, or at what hour of the day, the deeds or mortgages out of which the conflicting claims arose were executed." *Murfree's Heirs v. Carmack*, 4 Yerger, 270; *Grosvenor v. Magill*, 37 Ill. 239; *Louisville v. Savings Bank*, 104 U. S. 469.

We are of opinion, therefore, in the case in hand, that appellant was entitled in equity to priority of payment out of the proceeds of the sale of the mortgaged real estate, and that it was error to overrule her motion for a new trial.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the motion for a new trial, etc.

Filed Sept. 27, 1888.

Weir v. Hudnut.

No. 13,256.

WEIR v. HUDNUT.

STATUTE OF FRAUDS.—Part Payment.—Earnest Money.—Part payment of the contract-price of property bargained for is earnest-money, and will prevent the operation of the statute of frauds.

SAME.—Payment May be Made According to Contract of Parties.—Such part payment may be made not only in money, but in property or services, or whatever of value the parties agree shall constitute payment.

From the Posey Circuit Court.

E. D. Owen and *W. P. Edson*, for appellant.

A. P. Hovey and *G. V. Menzies*, for appellee.

ELLIOTT, J.—The appellant's amended complaint, omitting the formal parts, is this :

“ That the plaintiff sold five thousand bushels of corn to the defendant under a certain contract, that is to say, the defendant agreed to pay to the plaintiff for said corn fifty cents per bushel, and in part payment therefor, in addition to said fifty cents per bushel, the defendant further agreed to hire to plaintiff, and to give him the use of, a sufficient number of sacks in which to sack said corn and deliver the same to the defendant, which said use of said sacks became and was a part of the consideration and payment for said corn, and a part of the purchase-price therefor, which said purchase-price would have been more than fifty cents per bushel, in cash, but for the payment and furnishing the use of said sacks by said defendant as aforesaid ; and it was further agreed by and between the plaintiff and the defendant, as a part of said agreement of sale, that said corn was to be by the plaintiff delivered upon the bank of the Wabash river, at a point about two miles above the Louisville and Nashville Railroad bridge, and that the said sum of fifty cents per bushel was to be paid by the defendant to the plaintiff as soon as the same was shelled and delivered upon the bank of the said

Weir v. Hudnut.

river, as aforesaid. The plaintiff further says that, in pursuance of said contract, and in part payment of the purchase-price of said corn, the defendant did then and there, at the time of the making of said contract, furnish to the plaintiff fifteen hundred sacks, to have the use of the same for sacking, holding and delivering said corn, which sacks were of the value of one hundred dollars, and the use of the same, as aforesaid, was worth the sum of twenty-five dollars. The plaintiff further says that he did, according to the terms of said contract, deliver said corn, shelled and sacked, upon the bank of the Wabash River, at the place agreed, in good order and condition, of all of which he then and there notified the defendant, but that the defendant wholly refused and neglected to accept or take said corn according to said contract, and that by reason of the premises the plaintiff was damaged in the sum of one thousand dollars."

This complaint, it is important to note, avers that the delivery of the sacks, in which the corn was to be placed, to the seller was in part payment of the price of the corn. It is averred not only that payment was to be made in money and by furnishing the sacks, but that part payment was made of the agreed price by furnishing the sacks. We emphasize the fact that it was agreed that payment should be made by furnishing the seller with sacks, and that the sacks were furnished to him as part payment of the price of the corn which the appellee purchased. It is this fact which distinguishes the case from *Hudnut v. Weir*, 100 Ind. 501. Here the complaint avers, and the demurrer admits, that it was agreed that the sacks were to be furnished in part payment, and that in part payment they were furnished. In the complaint which came before us in *Hudnut v. Weir*, *supra*, there was no such averment. It is, perhaps, difficult to conceive how the averment can be established by evidence, but with that question we are not now concerned, for it is admitted to be true. It will not, of course, be sufficient to prove a part performance, for that will not be an "earnest to bind the

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bargain," since the plaintiff must prove payment, as payment, of part, at least, of the agreed price. But, as the case is now presented to us, there was, it is conceded by the demurrer, payment of part of the price agreed upon by the contracting parties. They agreed what should be taken in payment, and what was agreed upon was in part actually paid.

What the parties agree shall constitute payment, the law will adjudge to be payment. It is competent for parties to designate by their contract how and in what payment may be made. It is by no means true that payment can only be made in money; on the contrary, it may be made in property or in services. In short, whatever the parties agree shall constitute payment will be regarded by the courts as payment, provided the thing agreed upon is of some value. *Kuhns v. Gates*, 92 Ind. 66; *Tilford v. Roberts*, 8 Ind. 254.

It has been held in many cases that payment in articles of property will bind the bargain and prevent the operation of the statute of frauds. *Sharp v. Carroll*, 66 Wis. 62; *Bach v. Owen*, 5 T. R. 409; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Hunter v. Wetsell*, 84 N. Y. 549; *Combs v. Bateman*, 10 Barb. 573.

A text-writer thus states the rule: "There seems, therefore, no reason to doubt that the part payment required by the statute of frauds as an act in addition to the parol contract, in order to make a sale good, need not be made in money, but that anything of value which by mutual agreement is given by the buyer and accepted by the seller, 'on account' or in part satisfaction of the price, will be equivalent to part payment." 1 Benjamin Sales, section 194. Another writer says: "The statute evidently contemplates that the part payment shall be made at the time the contract is entered into, and shall be in money, or something of value which is accepted as its equivalent." Wood Frauds, section 294.

The thing delivered in part payment must be of some value, but if of any value at all, it will be sufficient to bind

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the bargain. One of the old writers says that "If all or part of the money is paid in hand; or I give earnest money, albeit it be but a penny," the contract is valid. Shepard Touch., 224; *Langfort v. Tiler*, 1 Salk. 113; *Artcher v. Zeh*, 5 Hill (N. Y.), 200; Wood Frauds, section 293.

Part payment of the price is earnest money, and binds the bargain. *Howe v. Hayward*, 108 Mass. 54; *Bissell v. Balcom*, 39 N. Y. 275; 2 Blackst. Com., 447; Wood Frauds, section 294.

The complaint brings the case within the principles declared by the authorities, for it shows that the value of the use of the sacks was twenty-five dollars, and that the purchase-price to that extent was paid by the seller's furnishing the sacks for the use of the buyer. If the seller had agreed to furnish for the use of the buyer a corn-sheller, or some other machine, as part payment of the purchase-price, it would be very clear that such a payment would bind the bargain, and there is no difference in principle between such a case and one like the present, for it can make no difference what thing of value is given in part payment. Of course the thing must be given in part payment of the purchase-money agreed upon or it will be unavailing; but here, as we have said, the property furnished the buyer is conceded to have been in part payment of the agreed price of the corn.

Judgment reversed.

Filed Sept. 27, 1888.

Noland et ux. v. The State, ex rel. Wasson, Auditor.

No. 13,334.

115	529
116	386
119	183
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124	108
126	62
115	529
138	106
115	529
152	376

NOLAND ET UX. v. THE STATE, EX REL. WASSON, AUDITOR.

PLEADING.— *Mortgage, Foreclosure of.—Promissory Note.— Complaint.—Demurrer.—Location of Mortgaged Premises.*—Where a complaint for foreclosure of a mortgage and for judgment on a promissory note secured thereby states a cause of action upon the note, a copy of which is set out, an objection that the mortgage sued on does not show that the real estate mortgaged is situate in any county in this State can not be reached by a demurrer for want of facts.

MORTGAGE.— *Misdescription of Mortgaged Premises.— Reformation of Instrument.—Pleading.— Complaint.*—Where it is shown by the complaint that a mortgage sued on was delivered to the auditor of a county to secure a loan of the common school fund of the State, and the instrument shows on its face that it was signed and acknowledged in that county, by residents thereof, the true and full description of the mortgaged premises, if omitted from the mortgage, may be supplied by the aid of proper averments in the complaint.

MARRIED WOMAN.— *Tenancy by Entireties.— Act of March 25th, 1879.— Debt of Husband.—Pleading.— Answer.— Necessary Averment.*—An answer by a married woman, to a complaint to foreclose a mortgage, executed while the act of March 25th, 1879, was in force, that the mortgaged real estate was held by her and her husband as tenants by entireties, and that the debt secured was the debt of her husband, is insufficient, in the absence of an averment that she acquired her interest therein by gift, descent or devise.

SAME.— *Separate Property.—Improvement of, and Discharge of Liens Upon.— Mortgage.—Lien.*—Where money is borrowed by the wife, or by the husband and wife, or by either of them, for the purpose of discharging valid liens existing on the wife's separate property, or for a purpose which enures to its benefit or protection, a mortgage properly executed on her separate property may be enforced.

From the Montgomery Circuit Court.

M. E. Clodfelter and T. E. Ballard, for appellants.

J. H. Burford and W. B. Herod, for appellee.

MITCHELL, J.—On the 5th day of June, 1880, Erastus W. Noland and Levina Noland, his wife, executed their joint promissory note for \$450, payable to the State of Indiana

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for the use of the common school fund, and secured its payment by a mortgage on real estate owned by them as tenants by entireties.

Having made default in the payment of the debt, this suit was brought by the State, on the relation of the county auditor, to foreclose the mortgage.

The complaint is in the ordinary form, except that it contains an averment that the money borrowed was used to pay off a prior encumbrance on the land, and it also contains the further averment that, by the mutual mistake of the parties, the real estate mortgaged was incorrectly described, in that the words "In Montgomery county, Indiana," were omitted from the description as written in the mortgage.

The appellants insist that the complaint did not state facts sufficient to constitute a cause of action, and that their demurrer to it should have been sustained. This position is untenable.

The complaint was for the foreclosure of a mortgage and for judgment on a note, copies of which instruments were properly set out. It did not, as the appellants assume, proceed upon the theory that the plaintiff was seeking to be subrogated to the lien of the prior mortgage, which had been discharged with the money borrowed from the school fund. The averments in that connection may be regarded as surplusage, and yet the complaint is entirely sufficient as a bill for the foreclosure of the mortgage. So the objection that the mortgage does not show that the real estate mortgaged was situate in any county within the State of Indiana. This objection could not be reached by a demurrer for want of sufficient facts, since the complaint, in any event, stated a cause of action upon the note, a copy of which was set out. *Bayless v. Glenn*, 72 Ind. 5.

Besides, the complaint was entirely sufficient in respect to that feature of it which sought a reformation of the description in the mortgage. It may be conceded, where the description in a mortgage is so ambiguous and uncertain as to

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render the instrument an absolute nullity, as in case it affords no clue to the State, county or locality in which the land is situate, that it can not be made valid by reformation, but the mortgage under consideration is not void for uncertainty. *White v. Stanton*, 111 Ind. 540.

It was delivered to the auditor of Montgomery county to secure a loan of the common school fund of the State, and it shows upon its face that it was signed and acknowledged in that county by mortgagors residing therein. Taking into consideration the facts which appear upon the face of the mortgage, that the mortgage was signed and acknowledged in Montgomery county, by residents of that county, and that the law required the auditor to take security on land situate in that county, and the legal presumptions which flow from those facts make the present a case in which a true description may be supplied by the aid of proper averments in the complaint. *Dutch v. Boyd*, 81 Ind. 146; *Bryan v. Scholl*, 109 Ind. 367.

In the first paragraph of her separate answer the defendant Lavina Noland alleged, in substance, that she was a married woman at the time she executed the mortgage in suit, being then, and still continuing, the wife of her co-defendant, Erastus C. Noland; that the mortgaged real estate was owned by herself and husband as tenants by the entireties, and that the debt secured was the debt of her husband. This answer was very properly held insufficient. The mortgage was executed while the act of March 25th, 1879, was in force. It does not appear from the averments in the answer that the wife acquired the property by gift, descent or devise. The pleading fails, therefore, to show that the mortgage was within the inhibition of the above act. Prior to the taking effect of the act of March 25th, 1879, married women had the power, under the provisions of section 5 of an act approved May 31st, 1852, to encumber their real property by deed in which their respective husbands should join, without limit. The act in force at the time the mortgage in suit was executed

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prohibited a married woman from encumbering her separate property, acquired by descent, devise or gift, as a security for the debt or liability of her husband or any other person. *Frazer v. Clifford*, 94 Ind. 482; *Vogel v. Leichner*, 102 Ind. 55; *Orr v. White*, 106 Ind. 341.

Under the law as it existed prior to the act of 1881, a wife had the general power in equity, as well as under the statute, to encumber her real estate by a deed in which her husband should join, except as restricted by the act of 1879. In order, therefore, to have made the answer good, it was necessary that it should have appeared that the real estate in question was acquired in such a manner as to have brought the mortgage within the prohibition of the statute.

Under issues made by other paragraphs of the answer, the court found specially, among other things, that the title to the land had been acquired by Lavina Noland as a gift from her husband, but that it was, at the time it was so acquired, subject to a mortgage of three hundred dollars, due for purchase-money.

It was further found that the money borrowed from the school fund was borrowed and used for the purpose of paying off the prior purchase-money mortgage. To the extent that the money was so applied the court enforced the mortgage in suit against the land. It has been held again and again, that where money was borrowed by the wife, or by the husband and wife, or by either of them, for the purpose of discharging valid liens existing on the wife's separate property, or for a purpose which enures to the benefit or protection of her property, a mortgage properly executed on her separate property may be enforced. *Fawcner v. Scottish etc., Co.*, 107 Ind. 555; *Fitzpatrick v. Papa*, 89 Ind. 17; *Vogel v. Leichner*, *supra*; *Cupp v. Campbell*, 103 Ind. 213; *Jouchert v. Johnson*, 108 Ind. 436.

The court did not err in admitting the prior mortgage in evidence. It was competent, in connection with the other testimony which tended to show that it remained unpaid until

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it was discharged with the money borrowed from the school fund. The evidence tends to sustain the finding. There was no error.

The judgment is affirmed with costs.

Filed Sept. 27, 1888.

No. 14,299.

MARKLEY, SURVEYOR, v. RUDY ET AL.

DRAINAGE.—*Repair of Ditches.*—*County Surveyor.*—*Disqualification of, on Account of Interest, etc.*—*Statute Construed.*—A county surveyor has no power to act, in the repair of ditches under the provisions of section 10 of the drainage law of April 6th, 1885, where lands owned by him, or by persons related to him within the prohibited degrees of consanguinity, are benefited by, and liable to assessment for, such repairs. In such case he should report his disability to the board of county commissioners, who must appoint a deputy to act. *Kelly v. Hocket*, 10 Ind. 299, overruled to the extent that it conflicts with this opinion.

SAME.—*Appeal from Surveyor's Assessment.*—*Separate Appeal.*—*What May be Considered on Appeal.*—Under the provisions of section 10 of the drainage law of April 6th, 1885, any person feeling himself aggrieved may separately appeal from any assessment made under that section, and on such appeal the question as to the competency of the surveyor to make the assessment, and all kindred questions, may be examined, either as preliminary or incidental to the trial on its merits.

From the Wells Circuit Court.

J. S. Dailey, L. Mock and A. Simmons, for appellant.

A. N. Martin and N. Burwell, for appellees.

NIBLACK, C. J.—The Wells Circuit Court, at its September term, 1882, on the petition of Constant Ehle and others, ordered the construction of a ditch within the county of Wells for the purpose of drainage, and a ditch, since known as the Ehle ditch, was constructed accordingly.

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128	396
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115	533
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115	533
165	554

Markley, Surveyor, v. Rudy *et al.*

On the 12th day of September, 1887, Theodore Ellingham, who was the owner of several tracts of land which had been benefited by, and had been assessed for, the construction of that ditch, gave a notice in writing to the appellant, Gabriel T. Markley, who was then, and thereafter continued to be, the surveyor of Wells county, requiring him to repair the ditch and to restore it to its original dimensions.

The appellant thereupon proceeded to repair the ditch and, as far as practicable, to restore it to its former condition, and to certify the cost thereof, including his own *per diem* for services, to the auditor of the county. To reimburse the county treasury for the cost of this work, he further proceeded to make assessments against the lands assessed in the first instance for the construction of the ditch, specifying the name of the owner of each tract of land. In connection with a considerable number of tracts of land belonging to other persons, lands owned by Franklin Rudy, Daniel Shire, Charles B. Evans and Aaron F. Cotton, respectively, were in this way assessed to pay the cost of repairing the ditch. In making these assessments, the appellant assumed to be governed by the provisions of section 10 of the drainage act of 1885. Acts of 1885, page 141.

Rudy, Shire, Evans and Cotton, the appellees here, severally appealed from the assessments made against their respective lands to the circuit court, making the appellant Markley, as the county surveyor, the defendant in all of their appeals.

The appellant Markley, appearing in the circuit court, moved to dismiss the appeal in each case because all the other persons whose lands had been assessed had not either joined in the appeal, or been notified, and thus afforded an opportunity to join in it, but his motion in each case was overruled.

The plaintiffs in these appeals then, in an effort to raise the question of the appellant Markley's jurisdiction to make the assessments appealed from, filed an affidavit in each case,

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charging that he, the appellant, was, at the time the repairs and assessment were made, the owner of two of the tracts of land benefited and assessed for such repairs, and that his father, Jonathan Markley, was the owner, at the same time, of two of the other tracts of land in like manner assessed for repairing the ditch; that, by reason of these facts, he was incompetent either to make such repairs, or to make assessments against the lands benefited for the purpose of keeping the ditch in repair.

The four appeals were thereafter consolidated, and the causes, as thus consolidated, were submitted to the court for trial. The appellant Markley, to facilitate the trial, admitted in open court that he was, at the time the ditch was repaired, and still was, the owner of two of the tracts of land benefited and assessed as stated, and that his father was at the same time the owner of two of the other tracts similarly situated. The circuit court thereupon declined to hear further evidence, and to proceed further with the trial, and made a finding that the assessments in controversy were unlawful and void, and rendered a judgment annulling and setting aside the assessments; also, against the appellant personally for costs. .

The assessments made against the lands benefited by the repairing of the ditch were, in their essential qualities, entirely several, and hence not in any sense joint assessments. While there may be some obscurity in certain respects in the provisions of section 10 of the act of 1885, above referred to, as to the scope and effect of, and as to the proper practice under, appeals to the circuit court, all the analogies lead us to hold that any person feeling himself aggrieved may separately appeal from an assessment made against his lands under that section. This view is impliedly confirmed by the provision that if more than one person shall appeal the cases shall be consolidated and tried together. Consequently, the motions to dismiss the appeals taken from the assessments in question were correctly overruled.

Markley, Surveyor, v. Rudy *et al.*

It is a fundamental rule in the administration of justice that no person can be judge in a cause in which he is interested. This rule applies to inferior tribunals, as well as to courts of general and appellate jurisdiction. This elementary principle has been so long and so universally recognized that it has become an accepted legal maxim. Broom Legal Maxims, 116.

It is also a general rule, nearly as well recognized, that no executive or administrative officer shall take official action in a matter involving the rights of others in which he is personally interested. There may be some minor exceptions to this general rule, resulting from some express or implied statutory enactment, or from the very necessity of the case, but, if so, that does not impair the force of the rule in its application to ordinary cases. Under our system of jurisprudence, provision is usually made for temporarily supplying the place of an executive or administrative officer in cases in which he is interested.

Section 5952, R. S. 1881, which constitutes a part of an original act providing for the election and prescribing the duties of county surveyors, enacts that "Such surveyor may appoint deputies; and whenever the services of the surveyor are required in a case where he is interested, the board of commissioners shall appoint a deputy to act."

The eleventh subdivision of section 240, R. S. 1881, declares that "When a person is required to be disinterested or indifferent in acting on any question or matter affecting other parties, consanguinity or affinity within the sixth degree, inclusive, by the civil law rules, or within the degree of second cousin, inclusive, shall be deemed to disqualify such person from acting, except by consent of parties."

The necessary deduction from these statutes, as well as from the general principles above announced, is, that the appellant was, on account of both personal interest and consanguinity, incompetent either to repair the ditch or to make assessments for the cost of repairing it. *Dawson v. Wells*, 3

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Ind. 398 ; *High v. Big Creek Ditching Ass'n*, 44 Ind. 356 ; *Bradley v. City of Frankfort*, 99 Ind. 417.

When he received notice that the ditch was out of repair he should have reported the fact to the board of commissioners, informing them of his interest in the ditch, and have asked them to appoint a disinterested deputy to make the necessary repairs and assessments.

So far as the case of *Kelly v. Hocket*, 10 Ind. 299, is inconsistent with the general principles on which the appellant's incompetency is made to rest, it must be regarded as overruled.

Section 10 also provides that when an appeal is taken from an assessment, "Such appeal shall be tried by the court, without a jury, and the only question tried shall be to determine the costs of such repair and what amount thereof should be assessed against the appellant's lands."

It is claimed that, under this statutory provision, the appellees here were restrained from raising any question in the circuit court upon the appellant Markley's competency to make the assessments appealed from, and that, consequently, that court erred in entertaining the question of his competency.

Taking all the provisions of section 10 into consideration, there is, as we have intimated, some obscurity, and hence room for construction as to what ought, in certain contingencies, to be the proper practice in appeals from assessments made under it.

It has often been held that in all judicial, or *quasi* judicial, proceedings, a party is entitled to his "day in court" where either his person or estate is, or is liable to be, involved in the contest. This is necessary that such proceedings may be in due course of law, and hence is fundamentally essential to their validity. As a recurrence to section 10 will disclose, the surveyor is not required to give any notice to the persons to be affected by his proceedings until after the ditch has been repaired and the assessments to reimburse the county

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treasury have been made. It is only through the medium of an appeal that a party feeling himself aggrieved can, in accordance with the provisions of said section 10, make any objection to the proceedings of the surveyor. From the very necessity of the case, therefore, the party appealing ought to be permitted to make every reasonable objection to the matters appealed from which the statute does not fairly and properly prohibit. The evident intention of section 10, *supra*, is to commit the question of the propriety of repairing a public ditch to the discretion and decision of the proper county surveyor, and to treat his decision in favor of the propriety of repairing it as final. We, consequently, construe the provision that upon the trial of an appeal the only question to be tried shall be to determine the costs of the repairs, and what amount of such costs should be assessed against the appellant's lands, to mean that upon the trial of the merits of the appeal the question of the propriety or necessity of repairing the ditch shall neither be reviewed nor taken into consideration, and that the investigation shall be confined to the amount which ought to be assessed against the lands of the appellant, leaving the question of the competency of the surveyor to make the assessments, and all kindred questions, open to examination as preliminary or incidental to the trial on the merits.

Applying this construction to the case before us, the circuit court did not err either in entertaining the question of the competency of the appellant Markley to make the assessments complained of, or in holding him to have been incompetent to make such assessments. Having been incompetent to make the assessments he assumed to make, judgment was rightly rendered against the appellant for the costs which the appellees in consequence incurred in the circuit court. *Wentworth v. Wyman*, 6 New Eng. Rep. 785.

As having a bearing on some of the questions here discussed, see the cases of *State, ex rel., v. Johnson*, 105 Ind. 463; *Fries v. Brier*, 111 Ind. 65; *Weaver v. Templin*, 113

Carver *et al.* v. Carver.

Ind. 298; *Davis v. Lake Shore, etc., R. W. Co.*, 114 Ind. 364; *Dunkle v. Herron, ante*, p. 470; *Johnson v. Lewis, ante*, p. 490.

The judgment is affirmed, with costs.

Filed Sept. 28, 1888.

115	539
120	200
115	539
165	337

No. 13,367.

CARVER ET AL. v. CARVER.

APPEAL BOND.—*Action on.*—*Supersedeas.*—*Mesne Rents and Profits.*—An appeal bond, given to make operative a supersedeas order, in an appeal from a judgment declaring the appellee's interest in an undivided portion of certain real estate, quieting her title thereto, and for a certain sum as damages, does not cover the mesne rents and profits of the appellee's interest in such real estate, the only proceeding stayed being the execution on such judgment.

BILL OF EXCEPTIONS.—*Long-Hand Manuscript of Evidence.*—For long-hand manuscript of evidence, held to be properly in the record by bill of exceptions, see opinion.

From the Madison Circuit Court.

M. S. Robinson and *J. W. Lovett*, for appellants.

H. D. Thompson, for appellee.

ZOLLARS, J.—A summary of the evidence is all that is necessary to present the controlling question in this case. On the 22d day of April, 1879, in an action in which appellee herein was plaintiff, and appellant William Carver and others were defendants, the Madison Circuit Court rendered a judgment and decree in her favor. So far as it is material here, that judgment was as follows:

"It is, therefore, considered that the plaintiff, Esther J.

Carver et al. v. Carver.

Carver, is the owner of, and entitled to the possession of the undivided third part in value of the following lands and lots described in the complaint, to wit: * * * It is further considered that the plaintiff recover of the defendant William Carver one hundred and twenty-five dollars, the damages assessed by the jury," etc.

From that judgment the defendants appealed, and filed the record in this court on or before the 9th day of September, 1879. On that day, the Hon. J. L. WORDEN, then a judge of this court, upon application of the appellants in the case, made an order "that execution and other proceedings on the judgment of the court be stayed as the law directs, whenever the appellants shall have given a bond according to law." On the 15th day of the same month, the appeal bond in suit here was filed with and approved by the clerk of the Madison Circuit Court, and, on the 18th day of the same month, it was filed in the office of the clerk of this court. All proceedings upon the judgment were in fact stayed, and William Carver, the real appellant, remained in possession of all of the real estate in controversy, receiving the rents and profits until the judgment was affirmed, on the 16th day of October, 1884. Subsequent to such affirmation, and before this action was commenced upon the bond, the one hundred and twenty-five dollars for which judgment had been rendered, as above stated, together with interest and all costs, was paid.

The only remaining elements of damages upon which a claim for a recovery upon the bond is predicated, are the mesne rents and profits of Mrs. Carver's portion of or interest in the real estate held and occupied by William Carver, as above stated.

That a bond upon appeal to this court will cover mesne rents and profits in a proper case, is settled by the case of *Opp v. TenEyck*, 99 Ind. 345. In that case, nothing was in the way of the plaintiff enforcing his judgment and thereby recovering possession of the land, except the appeal bond

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and the consequent stay of execution and all proceedings upon the judgment. That case was one purely for the recovery of the possession of real estate, and fell within the provisions of the statute in relation to the liability of bondsmen upon appeal to this court. The case before us is different. The supersedeas, and the bond in suit, given in pursuance of the action of this court ordering the stay, operated to stay execution and all proceedings upon the judgment. But for the supersedeas and the bond, the payment of the damages adjudged against the defendants, together with interest and costs, might have been enforced by an execution. That was all that could have been accomplished by an execution. And there were no other proceedings that could have been had upon the judgment by way of enforcing it. Mrs. Carver was adjudged to be the owner of an undivided one-third in value of the real estate, and to be entitled to the possession of it, but there was no way by which that judgment could have been enforced so as to eject William Carver and put her in possession. The judgment and decree made her a tenant in common with William Carver in the ownership of the real estate, she being the owner of the undivided one-third in value, and he the owner of the undivided two-thirds in value. To have put her in possession, would have been to eject him. That could not have been done, and was not attempted to be done by the judgment and decree. The rights of Mrs. Carver in the real estate were settled and declared and her title quieted, nothing more.

The only way by which she could have gotten possession of her interest in the real estate, without wrongfully disturbing William Carver in the rightful enjoyment of his interest, was by a partition and severance of their interests.

She might have prosecuted an action for partition notwithstanding the appeal by William Carver. Neither the appeal, the supersedeas nor the bond stood in the way of such an action, because such an action would not have been a proceeding upon the judgment appealed from. In such an ac-

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tion the judgment appealed from would have been competent and important evidence, but the action would not have been a proceeding upon the judgment.

It was not possible to institute any proceeding upon the judgment, aside from an execution, and, therefore, the supersedeas and bond did not stay any proceeding except an execution. Our conclusion here is fully sustained by the case of *Randles v. Randles*, 67 Ind. 434. See, also, *Central U. Tel. Co. v. State, ex rel.*, 110 Ind. 203, and cases there cited.

That Mrs. Carver did nothing to assert her rights in the real estate under the judgment and decree, and allowed William Carver to remain in possession of it without partition, is of no consequence so far as the liability of the obligors upon the bond is concerned. *Ham v. Greve*, 41 Ind. 531 (537).

Having reached the conclusion that the obligors are not liable upon the bond for mesne rents and profits, we need not consider the other questions discussed by counsel, except the point made by appellee that the long-hand manuscript of the evidence as made by the reporter is not properly in the record. That point, we think, is not well made.

The record shows that within the time given "the defendants, by their attorney, filed in the office of the clerk of said (Madison Circuit) Court their bill of exceptions, signed by the judge of said court, * * * which bill of exceptions is in these words, to wit." Immediately following that statement is the bill. On the first page is the title of the cause and an index of the witnesses. On the succeeding page is the following: "Be it remembered, that, upon the trial of the above entitled cause, the plaintiff, to maintain the issues joined on her part, introduced to the court as follows, that is to say." Following that is the evidence in behalf of the plaintiff. At the close of it is the statement: "Plaintiff rests." And following that is this: "Whereupon the defendants, to maintain the issue joined on their part, introduced in evidence to the court as follows, that is to say,"

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and then follows the testimony in behalf of the defendants. At the close of it is this: "Defendants rest. And this was all the evidence given in the above entitled cause." Following that is a verified certificate by the reporter that "the foregoing is a full, true and complete transcript of all the evidence given in the above entitled cause." The bill closes as follows: "And now, within the time granted by the court the defendants tender this, their bill of exceptions, and pray that the same may be signed, sealed and made a part of the record, which is done accordingly, this 25th day of August, A. D. 1886. D. Moss, Judge."

Without again referring to the cases cited and relied upon by appellee, it is sufficient to say that the late case of *McCormick Harvesting Machine Co. v. Gray*, 114 Ind. 340, fully meets every objection urged by her, and that, under the ruling in that case, the long-hand manuscript of the evidence is in the record, and the bill of exceptions sufficiently shows that it contains all of the evidence given in the cause. The agreements made during the trial were made and used as evidence, and hence are covered by the statement, "all the evidence given in the cause."

The record affirmatively shows that the judgment of the court below is not sustained by sufficient evidence, and is contrary to law. Whatever right of action appellee may have against appellant William Carver for the rents and profits of the land, it is clear that she has no such right of recovery upon the bond.

Judgment reversed, at appellee's costs.

Filed Sept. 28, 1888.

The Board of Commissioners of Hancock County v. Leggett.

No. 13,702.

**THE BOARD OF COMMISSIONERS OF HANCOCK COUNTY v.
LEGGETT.**

JURISDICTION.—Circuit Court.—Want of Jurisdiction Matter of Defence.—The circuit court is presumed to have jurisdiction of causes it assumes to try, and want of jurisdiction is a matter of defence.

SAME.—Pleading.—Complaint.—Action Against County for Defective Bridge.—Board of Commissioners.—Claim.—A complaint in an action to recover damages from a county for personal injuries sustained by reason of a defective bridge, is not bad for failing to set out with particularity the character of the claim for such damages filed with the board of commissioners.

EVIDENCE.—Defective Bridge.—Knowledge of Commissioner as to Condition of Bridge.—In such an action evidence is competent to prove that one of the commissioners had notice of the condition of the bridge.

SAME.—Declarations Expressive of Suffering.—In an action for damages for personal injuries, the injured party may show in evidence declarations connected with existing suffering and expressive of it, though he may not prove his declarations giving an account of the manner in which the injuries were received, or recounting what is past.

From the Wayne Circuit Court.

E. Marsh, W. W. Cook, J. F. Kibbey and J. H. Kibbey, for appellant.

J. A. New and E. W. Felt, for appellee.

ELLIOTT, J.—The complaint of the appellee seeks to recover damages sustained while attempting to cross a bridge of which the county was the owner, and which, as the complaint charges, it negligently failed to keep in a safe condition for travel.

The complaint is conceded to be sufficient in so far as it charges negligence on the part of appellant, but it is urged, in a very able argument, that it is insufficient because it does not show that the claim of the appellee was presented to the board of county commissioners before the action was insti-

115	544
116	444
117	496
120	429
121	300
123	157

115	544
128	191

115	544
134	302

115	544
137	13
139	621

115	544
163	872

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tuted. The allegations of the complaint upon this phase of case are these :

“And plaintiff says that before the commencement of this cause he filed his claim before the board of commissioners of Hancock county for the identical cause above set forth, and praying an allowance of said claim in settlement thereof; that, on the 14th day of December, 1885, said defendant, then being in regular session, disallowed his said claim, and refused to allow any part thereof.”

The position of appellant's counsel is thus stated in their brief:

“Appellant insists that these allegations are insufficient either to constitute a cause of action, or to clothe the court below with jurisdiction of the subject-matter of the action.

“The statute provides that no court shall have original jurisdiction of any claim against a county, unless the claimant shall file his claim with and have the same disallowed, in whole or in part, by the board of commissioners. Sections 5758, 5759, 5760, 5769, R. S. 1881.

“Section 5761, R. S. 1881, prescribes the mode of filing claims as follows:

“‘Section 5761. No allowance shall be made by such commissioners, unless the claimant shall file with such commissioners a detailed statement of the items and dates of charge, nor until such competent proof thereof is adduced in favor of such claim as is required in other courts,’ etc.

“It is not alleged that such a claim was filed, nor are there facts alleged that would show a compliance with the statute in that particular.

“However informal the claim filed with the commissioners may have been in other particulars, it was imperative that it should have given a ‘detailed statement of the items and dates of charge.’ *Board, etc., v. Ritter*, 90 Ind. 362.

“The prerequisites of the statute must all be complied with before the suit can be maintained. As we understand

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the object of the law, it is that the commissioners shall have an opportunity to examine the claim and hear evidence concerning its merits, and, if right, to allow it; but they can make no such allowance until a proper claim is filed.

“If we are correct in our assumption that the law contemplates that the board shall first have the opportunity to allow the claim before suit can be brought on it, then it is necessary that such a claim should be presented to the board, as they have power to allow; otherwise, the provision is wholly nugatory.

“For aught that appears in the complaint, and, in fact, in the evidence, the claim might have been disallowed because of such informality; the claim must at least have been such that an allowance based upon it would have been an adjudication that would have barred another suit for the same cause of action.”

The point made by appellant's counsel is decided against them by the case of *Bass, etc., Works v. Board, etc., ante*, p. 234. In that case it was held that, as the circuit court is a superior court of general jurisdiction, the presumption is that it had jurisdiction of the cause it assumed to try. It results from this doctrine that the want of jurisdiction is matter of defence, since the presumption makes a *prima facie* case in favor of the appellee, and such a case can only be defeated by affirmative evidence given upon an issue properly tendered.

Waiving many questions of practice made and insisted upon by the appellee's counsel, and assuming that questions upon the admission of evidence are properly presented, we give our attention to those questions. In doing this, we perhaps yield more to appellant than of right it is entitled to claim, but we best meet the important questions, as we believe, by this course.

As much as can be granted appellant, perhaps more than in strictness should be granted, is that objections are so stated and questions so presented as to bring before us the question

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whether the trial court was right in ruling that the appellee's declarations of existing pain and suffering were competent. It is our judgment that our own cases, as well as the very great weight of authority, decide the question against the appellant. The rule is that declarations of an injured person, indicative of existing pain or suffering, are competent, although narratives of past occurrences are not. An injured person may show in evidence declarations connected with existing suffering and expressive of it, but he may not give an account of the manner in which he received his injuries, nor recount what is past. *Carthage T. P. Co. v. Andrews*, 102 Ind. 138 (52 Am. R. 653); *Louisville, etc., R. W. Co. v. Wood*, 113 Ind. 544, and cases cited; *Roosa v. Boston, etc., Co.*, 132 Mass. 439; *Barber v. Merriam*, 11 Allen, 322; *McKegue, Adm'r, v. City of Janesville*, 68 Wis. 50; *State v. Davidson*, 30 Vt. 377 (383).

In the case last cited, REDFIELD, C. J., in speaking of such declarations, said: "The declarations of the party are received to show the extent of latent injuries upon the person, upon the general ground that such injuries are incapable of being shown in any other mode except by such declarations as to their effect, but they are not admitted as part of the *res gestæ*."

This is substantially what this court has said. It is evident that the reason for the rule is a sound one, since it is clear that as many of the organs of the body can not be seen, latent injuries can only be discovered and known through the declarations of the injured person.

We have given careful study to the case of *Roche v. Brooklyn, etc., R. R. Co.*, 105 N. Y. 294, but we can not assent either to the reasoning or the conclusion of the court in that case. It is conceded by the court that the rule was that such declarations were competent until the enactment of the statute permitting parties to be witnesses, but it is asserted that the rule was abrogated by that statute. It seems to us that if the law once was that such declarations were

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admissible, it was not in the power of the court to annul it. That could only be done by legislation. Where a statute is enacted changing the common law rule, it is to be strictly interpreted and is not to be extended by construction. It is an ancient and well known rule that statutes in derogation of the common law must be strictly construed. It would be a plain violation of this rule to hold that a statute changing the one rule of law changed another and independent one. The change in the rule does not dissipate the reason, for latent injuries can only be fully known by declarations made at the time the injured person is suffering. But, however this may be, the rule is an established one, and as courts can not legislate, they have no right to abrogate it. Judicial legislation is an evil to be avoided. The change in the law worked by the statute does not deprive a party of any competent evidence. The statute adds to his rights ; it subtracts nothing from them. Although the statute makes a party a competent witness, it does not abridge his rights by taking from him evidence competent under the rules of the common law. We can not agree, we say, in leaving this point, that a party is to be deprived of legitimate evidence because the statute permits him to testify.

Under the decisions of this court, by which we feel bound, it was competent to prove that one of the commissioners had notice of the condition of the bridge. *City of Lafayette v. Larson*, 73 Ind. 367 ; *City of Logansport v. Justice*, 74 Ind. 378 (39 Am. R. 79).

The court correctly instructed the jury upon the subject of contributory negligence, and upon the evidence we can not hold that the verdict is so clearly wrong as to justify us in setting it aside, although the case is a very close one.

Judgment affirmed.

Filed Sept. 28, 1888.

 Gilbert v. Hall et al.

No. 13,186.

GILBERT v. HALL ET AL.

PRACTICE.—Special Appearance.—What Steps May be Taken Under.—Jurisdiction.—Defects in Notice.—Waiver.—A special appearance may be entered for the purpose of taking advantage of any defects in a summons or notice, or to question the jurisdiction of the court over the person; but filing a demurrer or motion which pertains to the merits of the case, constitutes a full appearance and submission to the jurisdiction, and waives any defect in the notice or summons.

SAME.—Filing Papers.—Motions Must be Presented to Court.—Where proceedings or motions are required to be taken or made in a cause during its progress in term time, such motions and proceedings must be presented to the court, and its attention called thereto, and not merely filed in the clerk's office.

DRAINAGE.—Proceedings in Circuit Court.—Remonstrance.—Filing in Clerk's Office.—Practice.—Where, in a drainage proceeding in the circuit court, a remonstrance is filed in the clerk's office within ten days after the report of the commissioners has been made, but without notice to or leave of court, and is not presented to the court at that term, although in session for more than ten days after the filing of such report, the establishing of the drain, and confirmation of the assessments, and a refusal to entertain such remonstrance at the ensuing term is not erroneous.

From the Wells Circuit Court.

J. S. Dailey, L. Mock and A. Simmons, for appellant.

A. N. Martin and H. L. Martin, for appellees.

MITCHELL, J.—On the 24th day of October, 1884, Reuben Hall and six others filed their formal petition in the office of the clerk of the Wells Circuit Court, praying for the location and establishment of a ditch on a route which is specifically described in the petition. By a notation on the back of the petition, the second day of the ensuing November term was fixed as the day for the docketing thereof. The record shows that proof was made of the posting of notice at the court-house door on the 24th day of October, and that notices were duly posted in three public places in each of the townships in which lands to be affected by the proposed work were situate,

115	549
120	148
181	186
115	549
148	670

115	549
155	440

115	549
e168	58 ^a

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on the 25th day of October, 1884. The notices were to the effect that, on the second day of the ensuing November term of the Wells Circuit Court, the petitioners would present to the court their petition for the drainage of certain lands which, after giving the respective owners' names, were specifically described. On the day upon which the petition was docketed, William Gilbert entered a special appearance, and moved the court to set aside the notice, assigning as a cause therefor that it failed to show that a petition had been filed in the clerk's office. On the same day, and before the motion above mentioned was ruled upon, the record discloses that Gilbert appeared specially and filed another written motion, wherein he alleged that he was the owner of certain lands which would be affected by the construction of the proposed drain, and that the petition did not conform to the statute, in that it limited the discretion of the commissioners of drainage in an unwarranted degree in respect to the commencement and route of the proposed drain; and, further, that if the commissioners of drainage were permitted to make certain changes in that regard, the cost of the work could be substantially reduced, while the efficiency of the drain would be increased.

Upon these considerations he moved the court to compel the petitioners to amend their petition.

The court overruled the motion to set aside the notice, and this is complained of as error. It is said, because there was no mention in the notice that a petition had been filed, the case is controlled by the rulings in *McMullen v. State, ex rel.*, 105 Ind. 334, *Carr v. Boone*, 108 Ind. 241, *Deegan v. State, etc.*, 108 Ind. 155, and cases of that class. These cases hold, in effect, that under the drainage act of 1883 it was necessary that the petition should be filed before giving notice, and that a failure to file the petition until after the giving of notice might be taken advantage of in a direct proceeding on appeal.

The present is unlike the cases referred to, in that in the

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cases relied on no petition was on file at the time the notices were posted, while in the present the petition was in fact on file, but the notices made no reference to it, except to state that it would be presented to the court to be docketed on a day named. The statute provides that "if it appear to the court that notice has been given of the filing of said petition," etc.

The notice given was not in literal compliance with the statute, but it would require a most narrow construction to hold it insufficient. We do not find it necessary, however, to decide whether the variance is such as would require a reversal. Making and entering of record a motion to require the petitioners to amend their petition waived any defect there may have been in the notice, and this is so without regard to the fact that the appellant assumed to appear specially in order to make the motion. A special appearance may be entered for the purpose of taking advantage of any defects in the notice or summons, or to question the jurisdiction of the court over the person in any other manner; but filing a demurrer or motion which pertains to the merits of the complaint or petition, constitutes a full appearance, and is hence a submission to the jurisdiction of the court. *City of Crawfordsville v. Hays*, 42 Ind. 200; 1 Works Pr., sec. 224; *Ford v. Ford*, 110 Ind. 89, and cases cited.

Whatever conclusion we might have reached, in relation to the validity of the notices, in the absence of the motion which followed, relating to the petition, we are clear that the latter motion waived any defect in the notice, if there were any. As a matter of course, there having been some notice given, all those who are affected by the notice, and who did not appear and question its sufficiency, are now conclusively bound. The principle which governed the decision in *Wright v. Wilson*, 95 Ind. 408, does not apply.

We find it difficult, on account of the confused condition of the record, to determine satisfactorily whether it presents the questions discussed or not. It appears that the commis-

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sioners of drainage made their report to the court on the 5th day of January, 1886, that being the day appointed. The court continued in session each juridical day thereafter, except on the 14th day of January, until the morning of the 16th, when it adjourned for the term. On the 14th of January, the day on which the court was not in session, the appellant, without any previous notice to, or leave from, the court, filed in the clerk's office a written remonstrance against the report of the commissioners. The remonstrance so filed was not presented to the court until the ensuing term, although the court remained in session more than ten days after the filing of the report. It was not shown that the omission to present the remonstrance to the court within ten days was attributable to the fault of the petitioners, or that any notice had been given during the term at which the commissioners' report was filed that the appellant had filed a remonstrance in the clerk's office. The court refused to entertain the remonstrance when it was presented, and made an order establishing the drain and confirming the assessments as reported. There was no error in this ruling. The statute under which the proceedings were had declares that, upon the making of the report by the commissioners, ten days shall be allowed to any owner of lands affected by the work to remonstrate against the report. In *Crume v. Wilson*, 104 Ind. 583, it was held that after the expiration of ten days from the filing of the commissioners' report in a drainage case, if no remonstrance was presented, the statute made it the imperative duty of the court to make an order declaring the proposed work established.

So in *Morgan Civil Tp. v. Hunt*, 104 Ind. 590, what purported to be a remonstrance was filed within ten days. Afterwards, upon discovering that the paper purporting to be a remonstrance was not verified as the statute required, and without showing any excuse for the failure, leave was asked to file an amended remonstrance. It was held that the leave was rightly refused. These cases hold that the

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right to remonstrate, being a statutory right, must be exercised in strict compliance with the statute.

The statute requires that the court shall fix a time when the commissioners shall make their report, and the report can not be received except upon the day thus fixed, or upon some subsequent day to which the matter of making the report shall have been continued by order of the court. *Munson v. Blake*, 101 Ind. 78.

This requirement is to the end that persons whose lands are affected may certainly know when the commissioners' report is to be made, so that they may remonstrate to the court within the ten days allowed by law. If a party interested or entitled to remonstrate, having shown due diligence, was nevertheless prevented from presenting his remonstrance by the fault of the commissioners, or the adjournment of the court, or other circumstances beyond his control, the case would present a question for consideration upon the facts as they might appear. No question of that character is involved here.

Filing the remonstrance in the clerk's office without presenting it to the court within ten juridical days after the report of the commissioners had been received, there being ample opportunity to do so, was not remonstrating against the report of the commissioners within the meaning of the statute.

Ten days are allowed by the statute within which to *remonstrate* against the report, not to *file* a remonstrance with the clerk. The report of the commissioners, like the verdict of a jury, is made or returned to the court, and a remonstrance, like a motion for a new trial, or for a continuance, or any other similar motion, must be made to the court.

Where proceedings or motions are required to be taken or made in a cause during its progress in term time, such motions and proceedings must be presented to the court, and its attention called thereto, and not merely filed in the clerk's office.

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Waiving the objections made by the appellee, in which it is insisted that the record fails to present the questions considered, we have thus arrived at the conclusion that no erroneous ruling is presented.

The judgment is affirmed, with costs.

Filed Sept. 28, 1888.

115	554
135	218

115	554
156	40
156	589

No. 14,520.

MYERS v. THE STATE.

CRIMINAL LAW.—*Plea of Guilty.*—*Withdrawal of Plea.*—*Discretion of Court.*—Courts may, in their discretion, permit pleas of guilty to be withdrawn, or refuse to allow such withdrawal, and, except where there has been an abuse of such discretion, the Supreme Court will not interfere.

SAME.—*Withdrawal of Plea.*—*Abuse of Discretion of Trial Court.*—Where a prisoner, who is brought into court and arraigned on the same day an indictment is returned, being without counsel or means of employing them, and ignorant of his right to have counsel assigned him, acting in good faith upon an assurance from the prosecuting attorney that upon a plea of guilty the minimum punishment will be assessed, enters a plea of guilty, and punishment by imprisonment is thereupon adjudged against him eight years in excess of the minimum, he is entitled, upon motion made at the first opportunity thereafter, to a withdrawal of such plea, and the refusal of the court to sustain such motion is such an abuse of its discretion as will warrant the interference of the Supreme Court.

From the Morgan Circuit Court.

C. G. Renner, for appellant.

L. T. Michener, Attorney General, and J. H. Gillett, for the State.

ZOLLARS, J.—On the 5th day of September, 1887, the

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grand jury of Morgan county returned an indictment against appellant charging him with grand larceny in the theft of a horse, of the value of one hundred and fifty dollars. On the morning of the following day, after a judgment upon a plea of guilty had been entered upon the order-book, and, with other order-book entries, had been read in open court and signed by the judge, appellant, by counsel, moved the court to set aside the judgment, and to grant him leave to withdraw his plea of guilty, and enter a plea of not guilty. He supported that motion by his own affidavit, and also the affidavits of Joseph W. Paul and George L. Fesler. The affidavits, with the exception of that of Fesler, were written out and sworn to on the evening of the day on which sentence was pronounced.

The substance of appellant's affidavit is, that his plea of guilty was entered under the belief that his punishment should not exceed two years imprisonment in the State prison; that he was poor, without friends, and without money with which to employ an attorney to defend him; that he had no relatives or friends to assist him to employ counsel, or inform him of his rights; that he was ignorant of the law before and at the time he entered his plea of guilty, and acted upon the information of the sheriff who had him in custody, that the prosecuting attorney had agreed that if he would plead guilty his punishment should not exceed two years imprisonment; that, having been in jail for more than a month, without opportunity, or money, to employ counsel, and being ignorant, and relying upon the information furnished by the sheriff, he pleaded guilty, although he was innocent of the charge made against him in the indictment, and has a good defence.

The substance of Paul's affidavit is, that he is, and was, the sheriff of the county in whose custody appellant had been for more than a month before the return of the indictment; that during the time appellant was in his custody he (sheriff) had frequent conversations with him about the charge against him; that he said he was poor and unable to employ an at-

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torney, and asked his (sheriff's) advice ; that at appellant's request he went to, and counselled with, the prosecuting attorney, who proposed to accept a plea of guilty on appellant agreeing to accept an imprisonment of two years ; that he reported the proposition to appellant, and advised him that, under the circumstances, the best thing to be done would be for him to plead guilty and take two years imprisonment. and told him that the prosecuting attorney would agree to such an arrangement ; that appellant claimed that he was innocent, and did not want to plead guilty, and lamented that he was not able to defend himself, or procure assistance or counsel to do so for him, but finally consented to plead guilty and accept the two years imprisonment ; that the indictment was returned into court at three o'clock P. M., and appellant was immediately taken into court without the privilege of consulting an attorney, and was arraigned without an opportunity to advise with any one about his case ; that at that time the prosecuting attorney was absent from the county, but was represented by his deputy, who agreed, as had his principal, that if appellant would plead guilty the punishment should not exceed two years imprisonment, which agreement he (the sheriff) again communicated to appellant, and again advised him to acquiesce in it ; that immediately after appellant had pleaded guilty, the court, without hearing any evidence, adjudged that he should be imprisoned for ten years in the State prison ; that immediately afterwards appellant asked that he might have a hearing, and counsel and advice in his behalf, as to his rights under the charge against him, and Mr. Charles G. Renner, an attorney, was afterwards consulted.

The substance of the affidavit by Geo. L. Fesler is, that during appellant's imprisonment he was an assistant about the jail, and had almost daily conversations with him (appellant) ; that he informed him that the sheriff had told him that the prosecuting attorney had agreed that if he (appellant) would plead guilty, the punishment should not exceed

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two years imprisonment; that appellant claimed that he was innocent, and did not want to plead guilty; that several such conversations were had; that appellant finally said that he was innocent, but as he was poor and unable to make a defence, he would plead guilty if his punishment should not exceed two years imprisonment; that he reported to appellant that the prosecuting attorney had agreed to such an imprisonment, and advised him to plead guilty. The remaining portion of the affidavit, as to what occurred after the return of the indictment, is substantially the same as that by the sheriff.

These affidavits, without contradiction, or any attempt at contradiction, on the part of the State, stand, as the record shows, as all the evidence given upon the hearing of the motion.

We think that they show very clearly that the court below ought to have set aside the judgment and allowed appellant to withdraw his plea of guilty and substitute a plea of not guilty. The agreement by the prosecuting attorney was not sufficient to bar or cut off any rights of the State, for the reason that that officer had no authority to bind the State by such an agreement.

On the other hand, however, the prosecuting attorney is an officer and representative of the State, charged with the duty of managing and conducting criminal prosecutions. Persons not versed in the law are apt to, and, in most cases, doubtless do, think that he has authority to make such an agreement as was made in this case. Acting upon that belief, and without the aid or advice of counsel, appellant pleaded guilty to a charge of which he, all the while, asseverated he was innocent.

The officers who had him in custody were the only persons with whom he had any communication, and upon their advice he relied. If they were informed upon the subject, they at no time intimated to him that, although poor and friendless, he might have an attorney appointed for him by

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the court, but, on the contrary, advised him to plead guilty as the best thing to do in his helpless condition.

Almost immediately after the return of the indictment he was arraigned, and being reassured of the agreement on the part of the prosecuting attorney, and being again advised by the officers upon whose friendship he relied, he pleaded guilty, and instead of receiving the punishment agreed upon, he was sent to the State prison for ten years. He had the advice of no attorney until after the court adjourned for the day. The attorney called, as above stated, at once prepared the affidavits and motion, and at the first opportunity on the succeeding morning, at the same term of the court, filed the motion to have the judgment set aside, and for leave to appellant to withdraw his plea of guilty and substitute a plea of not guilty. That the court had authority to entertain and sustain the motion, we have no doubt. The courts would be impotent, indeed, if at the same term they were without authority to set aside a judgment upon a plea of guilty, rendered under the circumstances shown by the record in this case. We need not extend the opinion to discuss this feature of the case. It is sufficient to refer to the thoroughly considered case of *Sanders v. State*, 85 Ind. 318.

The rule is, that courts may exercise a discretion in allowing or refusing leave to withdraw pleas of guilty, and that an appellate court will not interfere unless there has been an abuse of such discretion. We think that this is a case in which this court is justified in holding that the court below ought to have exercised its discretion in favor of appellant, or, in the language of the law, that the court below abused the discretion which it was authorized to exercise.

No possible harm could have resulted, or can now result, to the State by allowing appellant to withdraw his plea of guilty and substitute a plea of not guilty.

If he is innocent of the charge, as he has, all the while, and under all circumstances, claimed, he ought to have a fair opportunity for a defence. If he is guilty, the State may

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have an opportunity to establish that guilt under a plea of not guilty.

In the conclusion we have reached here we are sustained by the authorities. We deem it sufficient here to cite the cases of *State v. Stephens*, 71 Mo. 535 (11 Cent. Law Journal, 5); *Gardner v. People*, 106 Ill. 76 (4 Crim. Law Magazine, 881).

In the latter case, the defendant, on the 25th day of November, upon a plea of guilty, was sentenced by the court to be hanged. On the 14th day of the following December, at the same term of court, he made application for leave to withdraw the plea of guilty, which was overruled. The facts in the case, and the ruling upon appeal, so far as they need be here stated, are embodied in portions of the syllabus as follows: "Where a person who stands indicted for murder is not of mature age, and is wholly ignorant of our language and institutions and the perilous situation in which he stands, and is without sufficient understanding to act intelligently for himself, it is the duty of the court to appoint him counsel, and not to enter a plea of guilty without the concurrence of such counsel." And again: "It was *held*, that the court erred, under the peculiar circumstances of the case, in accepting and entering the plea of guilty, and also in refusing to allow its withdrawal."

In the former case, also, the syllabus embodies the holding by the Appellate Court. It is as follows: "If the defendant enters a plea of guilty under the belief induced by something said or done by the judge, that by so doing he will receive a punishment less severe than the maximum allowed by law, he should not afterward be sentenced to the maximum, but should rather be permitted to withdraw his plea and file a plea of not guilty, if he so desires." In the course of the opinion it was said: "The law is not composed of a series of snares and pitfalls for the unwary, neither does it favor what Judge BLISS terms 'snap judgments.' *Henslee v. Canfax*, 49 Mo. 295. If these remarks apply in a civil case,

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then, *a fortiori*, do they apply in a criminal prosecution, where the liberty of the prisoner is at stake. Courts have always been accustomed to exercise a great degree of care in receiving pleas of guilty, in prosecutions for felonies, to see that the prisoner has not made his plea by being misled, or under misapprehension or the like." The judgment was reversed because of the refusal of the lower court to set aside the judgment and allow the defendant to withdraw his plea of guilty.

The judgment is reversed, the court below is directed to sustain appellant's motion, set aside the judgment, allow him to withdraw his plea of guilty and substitute a plea of not guilty.

The clerk of this court is directed to make the proper order for the return of appellant to the custody of the sheriff of Morgan county, to await further proceedings in the case.

Filed Sept. 29, 1888.

 No. 13,452.

NEISLER v. HARRIS ET AL.

115	580
150	102

FRAUD.—*Fraudulent Intent.*—*Must be Proved.*—*Presumption.*—The question of fraudulent intent is in all cases a question of fact, which can not be presumed, but when it is averred must be proved and found.

SPECIAL FINDING OF FACTS.—*Conclusions of Law.*—*Exception to Conclusions of Law Admits Correctness of Finding.*—An exception to a conclusion of law, based on a special finding of facts, admits that the facts have been fully and correctly found by the trial court.

FRAUDULENT CONVEYANCE.—*Conclusion of Law.*—*Practice.*—In an action attacking a conveyance as fraudulent, when the special finding of facts by the trial court does not disclose the existence of fraud or fraudulent

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intent in the conveyance, the plaintiff is not entitled to a conclusion of law thereon, nor a judgment in his favor.

From the Marion Superior Court.

L. Ritter and *E. F. Ritter*, for appellant.

D. V. Burns, for appellees.

HOWK, J.—In this case appellant, Neisler, as plaintiff, sued the appellees, Charles E. and Hannah W. Harris, as defendants. In his complaint, plaintiff alleged that, at and prior to the — day of —, 1884, defendant Charles E. Harris was and since had been indebted to plaintiff in the sum of \$3,000, for money laid out and expended by plaintiff for said defendant, and for his use and benefit, as shown by bill of particulars therewith filed; and that such indebtedness was then due and owing and wholly unpaid, although payment thereof had been theretofore demanded. Plaintiff averred that, while said defendant was so indebted to him, to wit, on the — day of —, 1884, said defendant purchased from one — Stilz certain real estate, particularly described, in Marion county, Indiana; that for the fraudulent purpose of cheating, hindering and delaying his creditors, and especially the plaintiff, said defendant procured said real estate to be conveyed to his wife, Hannah W. Harris, his co-defendant herein; that said Hannah W. paid no part of the consideration for said conveyance, but that the same was wholly paid by defendant Charles E. Harris; that, at the time said conveyance was made, said Hannah W. Harris had notice of the aforesaid fraudulent purpose of said Charles E. Harris; that, at the time said conveyance was made, said Charles E. Harris had no other property, subject to execution, sufficient to satisfy plaintiff's claim or any part thereof; and that, at the time this suit was commenced, said Charles E. Harris had no other property subject to execution. Wherefore, etc.

Plaintiff stated his alleged cause of action herein in two other paragraphs of complaint, which differ from the first

Neisler v. Harris et al. :

paragraph chiefly in this: That in each of the second and third paragraphs of his complaint, plaintiff has set forth certain contracts and agreements, in which he claims that the alleged indebtedness of said Charles E. Harris to him had its origin. It is not necessary, we think, to a proper understanding of this case, or of the questions presented for decision herein, that we should now give a summary even of the facts alleged by plaintiff in the last two paragraphs of his complaint.

Defendant Hannah W. Harris separately answered by a general denial of the whole complaint. Defendant Charles E. Harris separately answered in two paragraphs, as follows: 1. A general denial of the complaint; and 2. Payment in full of the demands sued for, before the commencement of the action.

Plaintiff replied by a general denial of the second paragraph of answer.

The issues joined were tried by the court; and at plaintiff's request, the court made a special finding of the facts, and thereon stated its conclusions of law in favor of defendant Hannah W. Harris, and (2) in favor of plaintiff as against defendant Charles E. Harris, in the sum of \$2,768.30. Over plaintiff's exception to the first conclusion of law, the court rendered judgment thereon that plaintiff take nothing by his suit as against said Hannah W. Harris, and that she recover of him her costs. On appeal, the general term affirmed the judgment at special term, and from the judgment of the general term the plaintiff prosecutes this appeal.

In general term below, plaintiff assigned error upon the first conclusion of law upon the facts found specially by the trial court, and he has properly presented here the same alleged error for our consideration.

The facts found by the trial court were substantially as follows:

1. On and before the 12th day of April, 1884, the plain-

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tiff, Oscar L. Neisler, and the defendant Charles E. Harris were partners engaged in manufacturing and selling patent coiled hoops and trunk-slats, upon leased property at numbers from 516 to 524 East Michigan street, in the city of Indianapolis, Marion county, Indiana, and owned the building, machinery, engines, boiler and mills situate thereon; and at and before that time, one Aden Baber had a mortgage upon said building and machinery, for the sum of \$4,000, taken to secure money loaned to said firm.

2. On the said 12th day of April, 1884, plaintiff sold and assigned his interest in said firm to the defendant Hannah W. Harris, who is the wife of defendant Charles E. Harris. Said Hannah W. Harris took said interest subject to and with knowledge of said mortgage to said Aden Baber, but did not assume or promise to pay the same. In said purchase, said Charles E. Harris acted as her agent, and, without any consideration moving to him, promised and agreed to pay all of the said firm's debts.

3. On the same day, said Charles E. Harris assigned all of his interest to said Hannah W. Harris in said firm, for the consideration of a former debt, and she conveyed to plaintiff a house and lot subject to a mortgage, which she did, leaving said Charles E. Harris no property with which to pay any of his debts, of which fact said Hannah W. was apprised and had knowledge.

4. Said Hannah W., by and through her said husband, Charles E. Harris, continued to carry on said business. She procured an insurance in the Farmers of York Insurance Company for \$1,000, upon said property, which she so purchased of plaintiff and her husband, Charles E. Harris. On the 6th day of August, 1884, said property burned down and said Hannah W. collected of said company upon said insurance the sum of \$769.55, which, with about \$300 derived from the sale of lots owned by herself and husband as tenants by entirety, she invested in the real estate on which she then resided, described in the complaint herein.

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5. Neither the said Charles E. nor Hannah W. Harris paid any portion of said mortgage to said Aden Baber, and plaintiff had been compelled to pay, and had paid, the sum of \$2,768.30 of said debt. All the other debts of said firm had been paid, and no debts had been made since the plaintiff sold out his interest in said firm, that were then unpaid; and there was none of the partnership property out of which any portion of said mortgage debt could be made.

Upon the foregoing facts the trial court stated the following conclusions of law:

"First. The foregoing facts are not sufficient to constitute any cause of action in favor of the plaintiff as against the defendant Hannah W. Harris.

"Second. The plaintiff herein is entitled to recover against the defendant Charles E. Harris the sum of twenty-seven hundred and sixty-eight dollars and thirty cents."

The only question for our decision in this case may be thus stated: Are the facts found specially by the trial court, the substance of which we have given, sufficient to constitute the cause of action stated by plaintiff against the defendant Hannah W. Harris, in any one of the paragraphs of his complaint herein?

We are of opinion that this question must be answered in the negative. By his exception to the first conclusion of law, plaintiff admits that the facts of this case have been fully and correctly found by the trial court. *Bass v. Elliott*, 105 Ind. 517; *Wynn v. Troy*, 109 Ind. 250; *Warren v. Sohn*, 112 Ind. 213.

Plaintiff did not claim in his complaint herein, or in any paragraph thereof, that he had a personal cause of action against the defendant Hannah W. Harris. As against her, the very utmost that he claimed in any paragraph of his complaint was, that she held the legal title to certain real estate, which had been conveyed to her by the procurement of her husband, Charles E. Harris, for the fraudulent purpose of cheating, hindering and delaying the husband's creditors, and

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especially the plaintiff. This is the cause of action stated by plaintiff against the defendant Hannah W. Harris, in his complaint herein; and the facts found specially by the trial court must sustain this cause of action, or the plaintiff can not recover as against said Hannah W. Harris in this suit. This is settled by our decisions. *Boardman v. Griffin*, 52 Ind. 101; *Phoenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1; *Thomas v. Dale*, 86 Ind. 435; *Cleveland, etc., R. W. Co. v. Wynant*, 100 Ind. 160.

In this State the question of fraudulent intent is, in all cases, a question of fact, which can not be presumed, but, when it is averred, must be proved and found. Section 4924, R. S. 1881; *Lockwood v. Harding*, 79 Ind. 129; *Morris v. Stern*, 80 Ind. 227; *Dessar v. Field*, 99 Ind. 548.

In the case in hand it will be observed that the trial court failed to find that there was any fraud or fraudulent intent in the conveyance to said Hannah W. Harris of the real estate which plaintiff sought to have subjected to the payment of his claim against said Charles E. Harris. If it were conceded that some of the facts specially found were badges of fraud, or *indicia* of fraudulent intent, still, as the trial court wholly failed to find the ultimate fact, the facts found were not sufficient in this case to entitle the plaintiff to a conclusion of law or judgment as against the defendant Hannah W. Harris. *Elston v. Castor*, 101 Ind. 426, on p. 445; *Stix v. Sadler*, 109 Ind. 254.

Our conclusion is, that, upon the facts found specially, the trial court did not err in concluding, as matter of law, that the facts so found were not sufficient to constitute a cause of action against said Hannah W. Harris.

The judgment is affirmed, with costs.

Filed Sept. 29, 1888.

The Jenney Electric Light and Power Company v. Murphy.

No. 13,237.

**THE JENNEY ELECTRIC LIGHT AND POWER COMPANY
v. MURPHY.**

MASTER AND SERVANT.—*Latent Defects in Implements of Labor.—Duty and Liability of Master.*—If an employee, reposing confidence in the prudence and caution of the employer, relies upon the adequacy of implements put into his hands to work with, and upon the safety of the place assigned him to work, and sustains injury in consequence of the failure or neglect of the employer to disclose latent defects or perils which the latter knew, or which he should have known of by the exercise of reasonable diligence, the employee is entitled to remuneration for his loss.

SAME.—*Master not an Insurer.—Tools and Appliances.—Dangerous Service.*—The employer is not an insurer against injury, nor is he required to furnish tools or appliances of the best or most approved design, safe beyond any peradventure or contingency; but he engages that he will not expose the employee to danger which is not obvious, or of which the latter has no knowledge or adequate comprehension, and which is not reasonably incident to and within the ordinary risks of the service undertaken.

SAME.—*Use of Obviously Defective Implement.*—If an employee voluntarily, without specific command as to time and manner, uses an obviously defective implement, the defect being alike open to the observation and within the comprehension of employer and employee, both stand upon common ground, and no recovery can be had for a resulting injury to the latter.

SAME.—Where an employee has within his own control the manner of using an obviously defective tool, and the means of securing safety if he chooses to employ them, if he neglects the means of security to himself he thereby elects to take the risk, and can not recover for a resulting injury.

From the Allen Superior Court.

P. A. Randall and *W. J. Vesey*, for appellant.

R. S. Robertson, for appellee.

MITCHELL, J.—This was a suit by William Murphy against the electric light company above named, to recover damages for personal injuries alleged to have been sustained by the plaintiff while in the company's service. The plaintiff had

115 566
116 573
120 317

115 566
126 447
127 57

115 566
122 112
122 342

115 566
124 108

115 566
128 295
130 668

115 566
140 626

115 566
144 692
146 465

115 566
148 465
152 400

115 566
153 116

115 566
154 587

115 566
161 402

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a verdict and judgment below from which this appeal is prosecuted.

Among other grounds upon which a reversal is claimed, it is contended that the evidence was wholly insufficient to sustain the verdict.

The undisputed evidence shows that the plaintiff engaged in the company's service on the 29th day of September, 1885, his duty being to assist in maintaining and repairing the lines of electric wires, etc., in the city of Fort Wayne, under the direction of Sylvester Town, the general foreman or superintendent of that branch of the company's business. He was twenty-three years old, and of ordinary intelligence and experience. On the morning of the fourth day after entering the company's service, the plaintiff and several other workmen employed by the company were directed by the foreman, Town, to take a certain ladder and proceed to the Robinson House, a hotel in the city, and adjust some electric wires over a door in the rear part of the building. The ladder which they were directed to take and use in accomplishing their work was from twelve to fourteen feet long, and had one of the side-rails broken off about twenty inches from the top, at or near a point where the top round entered the rail. It had been used in that condition for a year or more. The workmen having proceeded to the Robinson House as directed, the plaintiff mounted the ladder, which had been taken along, and while engaged in nailing on a bracket above the door, the ladder slipped and turned, the end of the short rail coming below the door-casing, so as to cause the plaintiff to be thrown with violence upon the steps below. He suffered a painful bruise or sprain of his elbow, causing the arm to become much swollen, down to and involving the wrist. The plaintiff had used the ladder before, and knew of its defective condition, which was open to the observation of any one, but did not consider it dangerous. In this respect the testimony of the plaintiff and that of the foreman,

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Town, is in accord. Both knew of the condition of the ladder. Neither regarded it as dangerous.

The question now is, must the company respond in damages for an injury sustained by the plaintiff in the use of a defective implement, the condition of which was equally known to both, and which both supposed could be used without danger.

The general rule relied upon in support of the judgment appealed from has often been declared and reiterated in recent cases decided by this court, and is thoroughly well settled everywhere. This rule requires the employer to furnish adequate tools and suitable implements and appliances for the use of the employee in the performance of the duties required of him, a safe and suitable place in which to prosecute his work, and, when the necessities of the work demand it, adequate direction and competent assistants in the performance of his duties. If an employee, reposing confidence, as he has a right to, in the prudence and caution of the employer, relies upon the adequacy of the implements put into his hands to work with, and upon the safety of the place assigned him to work, and sustains injury in consequence of the failure or neglect of the employer to disclose latent defects or perils which the latter knew, or which he should have known of by the exercise of reasonable diligence, the employee is entitled to remuneration for his loss. *Bradbury v. Goodwin*, 108 Ind. 286; *Krueger v. Louisville, etc., R. W. Co.*, 111 Ind. 51, and cases cited; *Mitchell v. Robinson*, 80 Ind. 281; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Louisville, etc., R. W. Co. v. Frawley*, 110 Ind. 18; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Stringham v. Stewart*, 100 N. Y. 516; *Pantzar v. Tilly, etc., Mining Co.*, 99 N. Y. 368; *Bean v. Oceanic Steam Nav. Co.*, 24 Fed. Rep. 124.

The employer does not, however, become an insurer of the

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employee against injury, nor does he covenant to supply tools and appliances that are safe beyond any peradventure or contingency, nor to furnish implements of the best, or most approved, or of any particular design. *Burke v. Witherbee*, 98 N. Y. 562; *Powers v. New York, etc., R. R. Co.*, 98 N. Y. 274; *Lake Shore, etc., R. W. Co. v. McCormick*, 74 Ind. 440. What he especially engages is, that he will not expose the employee to danger which is not obvious, or of which the latter has no knowledge or adequate comprehension, and which is not reasonably and fairly incident to and within the ordinary risks of the service which he has undertaken.

There is another equally well settled principle, correlative to the rules which define the duties of the employer, which holds the employee to the assumption of all risks naturally and reasonably incident to the service in which he embarks, so far as the hazards of the service are obvious and within the apprehension of a person of his experience and understanding. From the application of this principle, it follows that if an employee voluntarily, without specific command as to time and manner, uses an obviously defective implement, the defect being alike open to the observation and within the comprehension of employer and employee, both stand upon common ground, and no recovery can be had for a resulting injury. *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20, and cases cited; *Louisville, etc., R. W. Co. v. Frawley*, *supra*; *Umbach v. Lake Shore, etc., R. W. Co.*, 83 Ind. 191; *Philadelphia, etc., R. R. Co. v. Keenan*, 103 Pa. St. 124; *Green & Coates, etc., R. W. Co. v. Bresmer*, 97 Pa. St. 103; *English v. Chicago, etc., R. W. Co.*, 24 Fed. Rep. 906.

Thus it has been well stated, "that an employee who knows, or by the exercise of ordinary diligence could know, of any defects or imperfections in the things about which he is employed, and continues in the service without objection, and without promise of change, is presumed to have assumed all the consequences resulting from such defects, and to have waived all right to recover for injuries caused thereby."

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then, *a fortiori*, do they apply in a criminal prosecution, where the liberty of the prisoner is at stake. Courts have always been accustomed to exercise a great degree of care in receiving pleas of guilty, in prosecutions for felonies, to see that the prisoner has not made his plea by being misled, or under misapprehension or the like." The judgment was reversed because of the refusal of the lower court to set aside the judgment and allow the defendant to withdraw his plea of guilty.

The judgment is reversed, the court below is directed to sustain appellant's motion, set aside the judgment, allow him to withdraw his plea of guilty and substitute a plea of not guilty.

The clerk of this court is directed to make the proper order for the return of appellant to the custody of the sheriff of Morgan county, to await further proceedings in the case.

Filed Sept. 29, 1888.

 No. 13,452.

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FRAUD.—*Fraudulent Intent.*—*Must be Proved.*—*Presumption.*—The question of fraudulent intent is in all cases a question of fact, which can not be presumed, but when it is averred must be proved and found.

SPECIAL FINDING OF FACTS.—*Conclusions of Law.*—*Exception to Conclusion of Law Admits Correctness of Finding.*—An exception to a conclusion of law, based on a special finding of facts, admits that the facts have been fully and correctly found by the trial court.

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Neisler v. Harris et al.

intent in the conveyance, the plaintiff is not entitled to a conclusion of law thereon, nor a judgment in his favor.

From the Marion Superior Court.

L. Ritter and *E. F. Ritter*, for appellant.

D. V. Burns, for appellees.

HOWK, J.—In this case appellant, Neisler, as plaintiff, sued the appellees, Charles E. and Hannah W. Harris, as defendants. In his complaint, plaintiff alleged that, at and prior to the — day of —, 1884, defendant Charles E. Harris was and since had been indebted to plaintiff in the sum of \$3,000, for money laid out and expended by plaintiff for said defendant, and for his use and benefit, as shown by bill of particulars therewith filed; and that such indebtedness was then due and owing and wholly unpaid, although payment thereof had been theretofore demanded. Plaintiff averred that, while said defendant was so indebted to him, to wit, on the — day of —, 1884, said defendant purchased from one — Stiliz certain real estate, particularly described, in Marion county, Indiana; that for the fraudulent purpose of cheating, hindering and delaying his creditors, and especially the plaintiff, said defendant procured said real estate to be conveyed to his wife, Hannah W. Harris, his co-defendant herein; that said Hannah W. paid no part of the consideration for said conveyance, but that the same was wholly paid by defendant Charles E. Harris; that, at the time said conveyance was made, said Hannah W. Harris had notice of the aforesaid fraudulent purpose of said Charles E. Harris; that, at the time said conveyance was made, said Charles E. Harris had no other property, subject to execution, sufficient to satisfy plaintiff's claim or any part thereof; and that, at the time this suit was commenced, said Charles E. Harris had no other property subject to execution. Wherefore, etc.

Plaintiff stated his alleged cause of action herein in two other paragraphs of complaint, which differ from the first

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The judgment is reversed, the court below is directed to sustain appellant's motion, set aside the judgment, allow him to withdraw his plea of guilty and substitute a plea of not guilty.

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Neisler v. Harris *et al.*

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Plaintiff stated his alleged cause of action herein in two other paragraphs of complaint, which differ from the first

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& Boyd were engaged at Indianapolis, Indiana, in the business of buying and selling grain on commission, and of storing grain. For the purpose of carrying on their said business they leased what was known as the "Western Elevator," at Indianapolis, and this elevator was the principal place used by them in storing grain received by them to be stored.

7. About the 1st day of July, 1882, defendant, George D. Brown, entered into an agreement with said firm of Brown & Boyd, by the terms of which said Brown & Boyd agreed to receive from the defendant wheat, which he should ship to them to be stored, and store the same for him. It was further agreed between said firm and defendant that said Brown & Boyd should advance or loan to the defendant, from time to time, as said wheat should be received, certain sums of money, bearing a certain proportion to the market value of the wheat at the time of its reception. Defendant agreed to pay interest on said loans at the rate of seven per cent. per annum. Brown & Boyd also agreed to pay the freight charges for the shipment of said wheat, to keep it insured and to deliver it to George D. Brown whenever he should call for it. Defendant agreed to pay said loans, freight charges and insurance whenever said wheat should be delivered to him, or sold on his order. He also agreed to pay said Brown & Boyd two cents per bushel per month for the storage of said wheat. Said Brown & Boyd were to have a lien on said wheat, and to hold the same in pledge as security for the payment of said loans, freight, insurance and storage charges. If said loans, freight, insurance and storage charges should at any time amount to within five cents on the bushel of the value of the wheat in store, said Brown & Boyd should have the right to sell said wheat at the market-price, and, after deducting the amount due thereon, pay the remainder, if any, to the defendant, unless defendant should pay to them a sum sufficient to make the margin equal to five cents per bushel on the wheat stored.

8. In pursuance of said agreement, defendant shipped to

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said Brown & Boyd about thirty thousand bushels of wheat to be stored by them for him.

9. Before the notes in suit were executed, the firm of Brown & Boyd dissolved, and the business was continued by said B. D. Brown with the defendant, under the same agreement.

10. Said notes were executed to said B. D. Brown by defendant for charges which said B. D. Brown claimed were due from defendant, on account of wheat stored for him by the firm of Brown & Boyd, and by the said B. D. Brown.

11. Neither said firm of Brown & Boyd, nor the said B. D. Brown, stored or kept in store any wheat for defendant, either of the wheat shipped to them by him to be stored, or of like kind in grade or quality.

12. In November, 1884, said B. D. Brown failed in business, and, at the time of such failure, he did not have in store for the defendant a single bushel of wheat.

13. No warehouse receipts were ever issued to the defendant.

14. For all the wheat shipped by defendant, warehouse receipts were issued to Brown & Boyd, and, after the dissolution of the partnership, to B. D. Brown, by the Western Elevator Company, which, by the terms of its agreement with Brown & Boyd, and B. D. Brown, kept control of the issuing of warehouse receipts.

15. The assignment of the notes in suit to the plaintiff was based upon a valuable consideration, and, at no time prior to the commencement of this suit, did plaintiff have any knowledge of any defence to said notes, or of any defect or infirmity therein.

16. The firm of Brown & Boyd, and said B. D. Brown, had advanced or loaned to the defendant, in accordance with said agreement, sums of money at different times which, in the aggregate, with the interest thereon, amounted at the time the notes in suit were executed to within a little less

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than \$100 of the then market value of the wheat, upon which storage was charged.

17. After the said notes were assigned to the plaintiff, and before the note first maturing became due, the defendant requested of the plaintiff an extension of the time of payment of said first note for a period of three weeks, and promised and agreed with the plaintiff to pay both of said notes at the expiration of the time of such extension, if such extension of the time of payment should be granted. Defendant further agreed that, if such extension of the time of payment were given, he would within three weeks ship to one Philip E. Mitchner, of Indianapolis, a sufficient quantity of wheat to pay both of said notes; and said Mitchner then and there agreed with the plaintiff that, in consideration that the time of payment of said note should be so extended as aforesaid, he, the said Mitchner, would apply the proceeds and value of wheat, which should be so shipped to him by defendant, towards the payment and satisfaction of both said notes; and in consideration of the promises so made, plaintiff agreed to extend the time of payment of said note first maturing, for three weeks, and did extend the time of payment in accordance with such agreement.

Upon the foregoing facts, the court stated the following conclusions of law, to wit:

“1. The notes sued on are not negotiable under the law merchant, and are subject to all defences in the hands of the assignee that they would be in the hands of the payee.

“2. Said notes were executed without any consideration whatever.

“3. There was an extension of the time of payment of said first note, given to defendant by plaintiff for a definite time on a sufficient consideration.

“4. By virtue of said extension of time and the agreement of defendant to pay said notes at the expiration of said extension of time, defendant became liable to plaintiff for the payment of both of said notes.

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“ 5. The plaintiff is entitled to recover of the defendant the sum of \$1,870.05, without relief from valuation or appraisement laws.”

In discussing the alleged error of the court below, in its conclusions of law, appellant's learned counsel very earnestly insist that, as the court had found that the notes in suit were executed in settlement of an account wholly fraudulent, and without any consideration whatever, and were not negotiable under the law merchant, it was error to conclude, as matter of law, that appellee's agreement to extend the time of payment of the note first maturing, for a definite period of time, constituted a valid and sufficient consideration for appellant's promise to pay both of said notes. It will be noted that this contention of counsel is largely rested upon their assumption that the trial court correctly concluded, as matter of law, that the notes in suit were not negotiable under the law merchant. It is apparent that this conclusion of law is based solely upon the terms of the notes sued on, and upon no other fact or facts found by the court. Our statute, in force since July 5th, 1861, provides that “notes payable to order or bearer in a bank in this State shall be negotiable as inland bills of exchange, and the payees and indorsees thereof may recover, as in case of such bills.” Section 5506, R. S. 1881.

The written instruments sued on in this action, by the express terms thereof, are negotiable and payable to order in a bank in this State, and if they are not negotiable as inland bills of exchange under the law merchant, it is solely for the reason that such instruments are not “notes,” within the meaning of that word as used in our statute. The word “note” or “notes,” is not defined in our statutes, but, doubtless, is used therein in its legal sense. A note is a written promise, made by a certain person, to pay a certain sum of money to a certain person, at a certain time.

In *Glidden v. Henry*, 104 Ind. 278, the instrument sued

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on was in form a promissory note, and was payable to order in a bank in this State, but the terms of the instrument were such as to render the time of its payment uncertain and conditional; and it was there held, and correctly so, we think, that such instrument was not negotiable as an inland bill of exchange, but that the endorsee thereof, for value, and before maturity, took the same subject to all equities and defences existing between the maker and payee of the instrument. In stating as its first conclusion of law in the case in hand, "that the notes sued on are not negotiable under the law merchant," it may well be supposed that the court below regarded the case cited as decisive of the question in favor of such conclusion, although there is a marked and material difference, as it seems to us, between the terms of the instruments sued on in that case and those in suit in the case we are now considering. Waiving this point, and conceding, but by no means deciding, that the notes now in suit are not negotiable under the law merchant as inland bills of exchange, we proceed now to the consideration of the error first insisted upon as a ground for the reversal of the judgment below by appellant's counsel, namely: That the court erred in holding, as matter of law, that appellee's agreement to extend the time of payment of the note first maturing was a valid and sufficient consideration for appellant's promise to pay both of said notes.

We are of opinion that there is no error in this conclusion of the trial court. Upon the theory on which this cause was tried and decided below, it does not differ substantially, upon the point under consideration, from *Jaqua v. Montgomery*, 33 Ind. 36 (5 Am. R. 168).

In the case cited it appeared that the assignee of a promissory note, not governed by the law merchant, to whom it was assigned before maturity, after it became due agreed to extend the time of payment for a definite period, and did so, upon the promise of the maker that, if the assignee would so forbear, he would pay the note at the expiration of such

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period. Upon these facts the court there held that such promise of the maker constituted a new contract, binding in law, and capable of enforcement, though the maker had a good defence to the note before its assignment. The case cited is quoted, with express approval of its decision of the question we are now considering, in the later case of *Henry v. Gilliland*, 103 Ind. 177. See, also, *Doherty v. Bell*, 55 Ind. 205. Upon the facts found by the trial court, there is no error in any of its conclusions of law which is available to appellant for the reversal of the judgment.

It is claimed on behalf of appellant that the court erred in overruling his demurrer to the complaint herein. The only objection urged to the complaint is, that in the copies of the notes filed therewith there is a blank space, immediately preceding the words "promise to pay," etc., which was apparently intended to be filled by the pronoun "I" or "we," but was not so filled. There is no substance, we think, in this objection to the complaint. The blank space referred to clearly indicated the purpose for which it was left blank, and how and with what word it was intended it should be filled. In such case it was competent for the payee or any endorsee of the notes to fill such blank spaces with the proper pronoun, without impairing in any manner, or to any extent, the validity or binding force of such notes as contracts. *Marshall v. Drescher*, 68 Ind. 359.

The demurrers to each paragraph of complaint were correctly overruled.

Finally, errors are assigned here by appellant upon the overruling of his demurrers to each paragraph of appellee's reply to his answers herein. In his answers appellant pleaded specially that the notes were obtained from him by the fraud of the payee, and were executed without any consideration whatever therefor. To these special defences appellee replied, substantially, that after the notes in suit were assigned to it, and before the note first maturing became due, appellant requested of appellee an extension of the time of payment of

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such note first maturing, for a period of three weeks, and promised and agreed with appellee to pay both of such notes at the expiration of the time of such extension, if such extension should be granted, etc. ; and that, in consideration of the promise and agreement so made by appellant, appellee agreed to, and did, extend the time of payment of such note first maturing, for such period of three weeks, etc.

The only objections to such paragraphs of reply, urged on behalf of appellant, are that the matters therein stated are departures from the causes of action pleaded by appellee in its complaint herein. These objections to the paragraphs of reply, we think, are not well taken, and can not be sustained.

In section 357, R. S. 1881, it is provided that when any paragraph of answer contains new matter, the plaintiff may, "in separate paragraphs, reply any new matter which supports the complaint and avoids the new matter in such paragraph of the answer."

In the case in hand it is apparent, from our summary of the paragraphs of reply objected to, that the "new matter" therein supports the causes of action stated in the complaint, and avoids the new matter in appellant's paragraphs of answer. Under our civil code, the paragraphs of reply were properly pleaded, and were not objectionable on the ground of departure, and appellant's demurrers thereto were correctly overruled. *Doherty v. Bell, supra.*

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Oct. 10, 1888.

The City of Indianapolis v. Huegele.

No. 14,307.

THE CITY OF INDIANAPOLIS v. HUEGELE.

STATUTE.—Metropolitan Police Act of 1883.—Construction.—Criminal Law.—Interfering with Policeman.—City of Indianapolis.—Ordinance.—By the provisions of section 10 of the metropolitan police act of 1883, the interfering with or interrupting a member of the police force therein provided for, when making an arrest, is made a criminal offence, and a city ordinance of said city covering the same ground is, under section 1640, R. S. 1881, ineffective and void.

CONSTITUTIONAL LAW.—Section 10, Metropolitan Police Act, Constitutional.—Title of Act.—Section 10 of the metropolitan police act of 1883 is embraced within the title of the act, and is constitutional.

From the Marion Circuit Court.

W. L. Taylor and H. E. Smith, for appellant.

J. N. Scott, for appellee.

ZOLLARS, J.—Section 2 of an ordinance of the city of Indianapolis, passed in 1866, is as follows:

“Any person who shall wrongfully interfere with any policeman or officer of said city, while making an arrest, shall be fined in any sum not exceeding one hundred dollars.”

Can appellee be fined under this ordinance for having interfered with a policeman in making an arrest in 1887? If he can, the judgment must be reversed. If he can not, the court below ruled correctly, and the judgment must be affirmed.

Section 67 of the criminal procedure act of 1881, R. S. 1881, section 1640, provides that “Whenever any act is made a public offence against the State by any statute and the punishment prescribed therefor, such act shall not be made punishable by any ordinance of any incorporated city or town; and any ordinance to such effect shall be null and void, and all prosecutions for any such public offence as may be within the jurisdiction of the authorities of such incor-

115	582
121	520
122	114
115	581
129	530
115	581
130	436
130	417
115	581
137	561
115	581
142	186
115	581
145	450
115	581
148	647
152	16
115	581
160	883
115	581
161	213
115	581
171	666

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porated cities or towns, by and before such authorities, shall be had under the State law only."

If, then, the interfering with an Indianapolis policeman in the making of an arrest is made a public offence against the State by any statute, and the punishment prescribed therefor, this prosecution by the city under the ordinance can not be maintained. To determine that question, we must look to the metropolitan police act of 1883, Acts 1883, p. 89, under which the police force of Indianapolis is appointed. That act provides for a metropolitan police, and the establishment of a board of metropolitan police commissioners, in cities of twenty-nine thousand or more inhabitants, according to the census of 1880, and for the appointment by such board of a superintendent of police, captains, sergeants, detectives, and such other officers and patrolmen as they may deem advisable, etc. Section 10 of the act is as follows: "Any person or persons, or corporation, or common council, or other municipal, township, county, or State officer or officers, who shall in any manner interfere with or interrupt the board of metropolitan police commissioners of such city, in any act of theirs, while in the legal discharge of their duties, as provided in this act, or of the police force herein authorized to be created, or shall prevent such board or force from discharging their duties, as defined in this act, shall, upon conviction before the mayor or city judge, or before the circuit or criminal court of said county, be fined not less than one hundred dollars nor more than one thousand dollars; to which may be added imprisonment for not less than ten days nor more than ninety days, for each separate offence."

Counsel for appellant contend that this statute does not make an interruption, interference with, or the resisting of, a police officer or patrolman an offence. They say: "It is maintained by the city that section 10 of the act above quoted, makes provision only against the interference with the board of metropolitan police commissioners, and prescribes a penalty

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only for such persons as have power to interfere with, and interrupt, the board of metropolitan police commissioners."

They insist that the real purpose of the section may be discovered by interpreting it to read as follows: "Any person * * * who interferes with or interrupts the board of metropolitan police commissioners of such city in any act of theirs, * * * or of the police force," etc. They say: "The board of metropolitan police commissioners (of the city) is the only object of the verbs. This object is modified by two phrases—prepositional phrases: 1st. In any act of theirs. 2d. Or of the police force, etc. The board being the only object, the interference can only be with it," etc.

In their reply brief they say further: "The bill offers no protection to an officer at all, and was not designed to do so. It was not designed to change anything except the method of appointing the city's police force. The point the city contends for is, that any such an act as interferes with the working of this new method of appointment, or with the new system of appointment, is punishable under section 10 of the metropolitan police bill," etc.

Counsel for appellant also contend that if it should be conceded that section 10 provides a penalty for interfering with, or interrupting the police force, it is only for interrupting or interfering with the force as a collective body, when acting as a body, and does not apply when such interruption or interference is with a single policeman in the discharge of his duties.

Without following the arguments in detail, these statements and quotations from appellant's briefs show, in general, the position of its counsel upon this branch of the case.

After a careful examination of section 10, *supra*, and the whole of the metropolitan police act, we are unable to give our sanction to the construction contended for by appellant's counsel.

That section 10 makes certain acts as connected with the

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police force an offence, and prescribes a punishment for persons guilty of such acts, we think is quite clear.

Omitting for the present that portion of the section which provides against interruptions and interference, and noticing that "such board and force," immediately following, mean board of metropolitan police commissioners and police force, the section may be read thus: Any person or persons, etc., who shall prevent the board of metropolitan police commissioners, or police force, from discharging their duties as defined in this act, shall, upon conviction, etc., be fined, etc. The board of metropolitan police commissioners and police force are both objects of the verb, and to prevent either of them from discharging their duties as defined in the act is an offence for which the same punishment is provided.

It yet remains to be determined whether the offence defined can be committed only against the police force when acting as a body, as contended by counsel. That the Legislature did not so intend seems clear to us. In the first place, occasions requiring the united action of the whole force must be very rare. A riot would be such an occasion, but riots are not likely to occur in Indianapolis, nor, indeed, in any of our cities.

The police force provided for by the act have not authority to act collectively or otherwise in the establishment of rules and regulations for the government of the force. That authority is given by the act to the board of metropolitan police commissioners. It is hardly reasonable, therefore, to suppose that the Legislature intended to provide against preventing the police force from discharging their duties while acting as a body, when they so rarely thus act, and intended, also, to leave the officers and members of the force without any sort of protection when acting separately in the discharge of their duties. In the second place, we think, that, looking to the act as a whole, it is manifest that the intention was to provide against preventing the discharge of duty on the part of the force whether acting as a body or individually, and

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more especially when acting individually, as in that capacity about all the service of the force is rendered.

The language of section 10 is, any person, etc., who shall prevent the board and force from discharging their duties "as defined in this act." The duties of the board are defined, and so, too, are the duties of the police force defined in the act, but, as to the police force, the duties so defined are the duties to be performed by the force when acting separately as officers and patrolmen, constituting the force.

The 6th section of the act, for example, provides that the officers and members of the metropolitan police force shall possess all the common law and statutory powers of constables, except for the service of civil process.

It is provided by the 8th section that the members of the metropolitan police force shall have the exclusive power, and it shall be their duty, to serve all process within such city issuing from the mayor or city judge, etc., etc.

If section 10 does not provide a penalty for preventing the policemen from discharging their duties, it provides nothing in relation to the police force, because, as above stated, the offence defined in the act is the preventing of the force from discharging the duties defined in the act. The duties defined in the act to be performed are not to be performed by the force acting in a body, but when acting separately. Therefore, if the section is to have any force and practical application, it must be construed as meaning that any person who shall prevent policemen from discharging the duties defined in the act, shall be guilty of an offence and punished.

Looking to the whole act, we are clearly of the opinion that it must be so construed. Looking to the whole act, it is apparent that "police force" was used by the law-makers as meaning, not only the force as a body, but also the constituent members of that body. In that sense "police force" seems to have been used in other sections of the act.

In the 5th section it is provided that the board of metro-

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politan police commissioners shall "exercise the entire control of the police force of such city." That, evidently, means that the board shall exercise control over the force as a body, and over the individual members constituting the body. So, in section 11, it is provided that additional policemen, to be appointed in certain cases, "shall conform to the general discipline of the police force of such city," etc. Here again, the discipline of the "police force" is not limited to the force acting as a body, but includes the individual members constituting the force.

Policemen, appointed under the act, undoubtedly have authority to arrest violators of the law, and what they have authority to do it is their duty to do. Any person who may prevent them from discharging such a duty will be guilty under the act.

Having decided this much, we are brought to the specific question as presented by the record before us.

Appellee was not arrested upon a charge of having prevented the policeman from discharging his duty, but upon a charge of having interfered with that officer when making an arrest of a violator of the law; in other words, in the language of section 10, *supra*, upon a charge of having interrupted and interfered with that officer in an act of his while in the discharge of his duty.

Section 10 clearly makes it an offence for any one to interrupt or interfere with the board of metropolitan police commissioners in the discharge of its duties, and to prevent it from discharging those duties. It just as clearly, as we have seen, makes it an offence to prevent the police force from discharging their duties.

Did the Legislature intend to thus make it an offence to prevent the police force from discharging their duties, but in no way protect them from interruption and interference in the discharge of those duties? Was it the intention that an interference and interruption shall not be within the inhibition until they shall reach the extent of preventing the police-

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men from discharging their duties? If so, the protection to policemen in the discharge of their duties is of but little practical consequence.

The construction put upon the section by appellant's counsel, it seems to us, would not accomplish the end which they seek to accomplish.

Their position is, that the interference and interruption inhibited have reference to the board of metropolitan police commissioners alone, and that such interruption or interference of the board must be in some act of theirs or in some act of the police force. Here, again, we have no doubt that "police force" must be taken to mean not only the force as a body, but, also, the members of the force, collectively and individually. Bishop Statutory Crimes, section 213.

If it be said that under section 10, *supra*, there can be such a thing as interrupting and interfering with the board of metropolitan police commissioners in an act of the policemen, a person who should so interfere or interrupt will be liable to the punishment prescribed by the section, and hence can not be prosecuted under the ordinance.

But the construction of section 10 contended for can not be the correct one. To give it that construction renders it awkward, and almost, if not quite, meaningless. Taking the section as a whole, we think it may be said that it is apparent that the Legislature intended to make it an offence for any person to interrupt or interfere with the board or police force in the discharge of their duties, or to prevent them, or either of them, from discharging their duties as defined in the act. That purpose should be carried out, if it can be done under the rules of construction of statutes. In the phrase, "or of the police force herein authorized to be created," the use of the preposition "of" is, doubtless, a grammatical mistake. Disregarding that, the section may be made to read as we have suggested it ought to read.

It has often been stated by the courts, that in the construction of statutes the prime object is to ascertain and carry out

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the purpose and intent of the authors; that to do this the words used should first be considered in their literal and ordinary signification; that if, by giving them such a signification, the meaning of the whole instrument is rendered doubtful, or is made to lead to contradictions, or absurd results, the intent, as collected from the whole instrument, must prevail over the literal import of terms, and control the strict letter of the law. *State, ex rel., v. Mayor, etc.*, 28 Ind. 248; *Smith v. Moore*, 90 Ind. 294 (305); *City of Valparaiso v. Gardner*, 97 Ind. 1 (6); *City of Evansville v. Summers*, 108 Ind. 189.

So, it has been said, that it is an established rule, applicable to the construction of all remedial statutes, that cases within the reason, though not within the letter of a statute, shall be embraced by its provisions, and that cases within the reason, though not within the letter, shall be taken to be within the statute. *State v. Canton*, 43 Mo. 48; *People v. Lacombe*, 99 N. Y. 43; *Middleton v. Greeson*, 106 Ind. 18.

It is well settled that criminal statutes are to be strictly construed, but it is also well settled that they, like all other statutes, must be given a reasonable construction, and one that will, if possible, carry out the intention of the law-makers.

Mr. Bishop, in his work on Statutory Crimes, at section 200, says: "Equally in strict interpretation as in liberal, the object is simply to ascertain the true legislative will,—to arrive at which, is the end of all interpretation. A rendering so strict as to defeat this will is never admissible."

At section 212 it is further said: "It is not a violation of the rule of strict construction to give the words of a statute a reasonable meaning, according to the intent of the makers, disregarding captious objections, and even the demands of an exact grammatical propriety."

Again, at section 243, it is said: "However desirable a correct use of the English language may be, the courts have no jurisdiction to enforce it on the Legislature. Therefore,

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as already seen, when the legislative meaning is plain, the exact grammatical construction and propriety of language may be disregarded, even in a penal statute. * * The conjunction 'and' will be read as 'or,' and 'or' as 'and,' when the sense obviously so requires."

At section 215, the author correctly states the ruling in the case of *Worrell v. State*, 12 Ala. 732, as follows: "An Alabama act made it punishable to 'buy, *sell*, or receive *from* any slaves,' certain things without his master's consent. And it was held to be infringed by a sale *to* the slave; for its obvious meaning should not be defeated by the inaccurate use of a preposition."

In speaking of the case of *State v. Acuff*, 6 Mo. 54, the author further says: "In the following statute of Missouri, the second 'of'—printed in italics—is rejected in the construction: 'If any guardian of any white female under the age of eighteen years, or *of* any other person to whose care or protection any such female shall have been confided, shall defile her by carnally knowing her,' etc.; and thus its penalties extend to persons in care who are not guardians, as well as to those who are."

In the case of *Zorger v. City of Greensburgh*, 60 Ind. 1, this court decided that an ordinance of the city of Greensburgh making it an offence to be found associating with certain characters "in a public place, street, alley, common, or within said city limits," meant, and should be construed to mean and read, "in any public place, street, alley, or common within said city," thus making the conjunction "or" to precede instead of to follow the word "common." See, also, *Clare v. State*, 68 Ind. 17; *Matter v. Campbell*, 71 Ind. 512.

We have thus referred to the rules of construction and cited authorities to show that the preposition "of" above mentioned may be disregarded, in order to render the statute intelligible, and give to it such an interpretation as will carry out the intention of the Legislature in its enactment.

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Appellant's counsel further contend that if section 10 defines an offence and prescribes a punishment, that portion of it must be held unconstitutional because not embraced in the title of the act.

Section 19 of article 4 of the Constitution, R. S. 1881, section 115, is, that "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title," etc.

So far as is material here, the title of the act under consideration is as follows: "An act providing for a metropolitan police in all cities of twenty-nine thousand or more inhabitants." That title clearly embraces the establishment and maintenance of a metropolitan police. The establishment and maintenance of such a force is the subject expressed in the title. The provisions in section 10 for the punishment of persons who may interfere with that force in the discharge of their duties, or who shall prevent them from discharging those duties, are clearly, we think, matters properly connected with the subject expressed in the title.

We do not think that it would be profitable to extend this opinion by way of argument in support of this conclusion, and we content ourselves with a citation of some of the numerous cases in which the above section of the Constitution has been interpreted. *Hingle v. State*, 24 Ind. 28; *Reams v. State*, 23 Ind. 111; *Robinson v. Skipworth*, 23 Ind. 311; *Reed v. State*, 12 Ind. 641; *Bitters v. Board, etc.*, 81 Ind. 125; *Warren v. Britton*, 84 Ind. 14; *Crawfordsville, etc., T. P. Co. v. Fletcher*, 104 Ind. 97; *Barnett v. Harshbarger*, 105 Ind. 410; *State, ex rel., v. Sullivan*, 74 Ind. 121; *Shipley v. City of Terre Haute*, 74 Ind. 297; *State v. Newton*, 59 Ind. 173; *Farrell v. State*, 45 Ind. 371.

Other questions are discussed by counsel which need not be noticed. The court below held that appellee could not be prosecuted under the ordinance. That ruling is correct, for the one sufficient reason, that the acts with which he was

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charged are made a public offence and punishable by the metropolitan police act.

Judgment affirmed, with costs.

Filed Oct. 10, 1888.

115	591
120	97
115	591
150	677

No. 14,497.

**CAMPBELL v. THE BOARD OF COMMISSIONERS OF THE
STATE SOLDIERS AND SAILORS MONUMENT.**

STATUTE.—*Soldiers and Sailors Monument.*—*Statute Construed.*—*Appropriation.*—Under the provisions of the act of March 3d, 1887 (Acts 1887, p. 30), the whole amount of money therein appropriated, must, as far as it may be used at all, be devoted to the structural work of the soldiers and sailors monument, therein provided for, and not to the incidental expenses connected therewith which do not enter into the cost value of the edifice.

SAME.—*Incidental Expenses of Board.*—*Payable Out of General Fund.*—*Auditor of State.*—The auditor of state has authority to draw his warrant on the treasurer of state for the merely incidental expenses incurred from time to time in the erection of the soldiers and sailors monument, under the act of March 3d, 1887, to be paid out of the general fund, when there is sufficient money in that fund to pay the amount of such warrant.

From the Marion Circuit Court.

A. J. Beveridge, for appellant.

S. B. Voyles, for appellee.

NIBLACK, C. J.—Complaint by William B. Campbell against The Board of Commissioners of the State Soldiers and Sailors Monument, organized under the act of March 3d, 1887 (Acts 1887, p. 30), to enjoin such commissioners from expending for all purposes a sum greater than two hundred thousand dollars out of the state treasury in the erection of the monument which they are required to build.

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The complaint averred that the commissioners had adopted a design and plan for the monument, based upon an estimate which will absorb the entire amount of \$200,000, appropriated by the act of 1887, referred to, in its construction alone, exclusive of the salaries of such commissioners, the salary of their secretary, and other incidental expenses, and were entering into contracts for the construction of the monument upon the basis of such an estimate; that the plaintiff was a taxpayer of the State, and hence interested in the question of the amount which may be expended on account of the proposed monument.

A demurrer was sustained to the complaint, and the defendants had judgment upon demurrer.

The demurrer was sustained upon the theory that the sum specifically appropriated by the Legislature ought to be exclusively devoted to the building of the monument, and that all merely incidental expenses, including compensation to the officers in charge of the enterprise, are to be paid out of some other fund belonging to the State.

The first section of the act of 1887 is as follows: "That the sum of two hundred thousand dollars be and the same is hereby appropriated, out of any moneys in the treasury not otherwise appropriated, for the purpose of erecting a State soldiers and sailors monument, said appropriation to be used in connection with such other funds as have already been, or may hereafter be, donated and contributed for said purpose."

The second section provides for the appointment of five commissioners, who are required to give bond, and to take the usual oath of office, and to proceed to erect a suitable monument; also, that such commissioners shall receive for their services the sum of four dollars per day and travelling expenses for the time they are actually employed in attending to their duties as such commissioners, to be paid on itemized statements sworn to by the claimant.

The third section further provides that "Said commissioners are authorized and directed, as herein provided, to build

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a State soldiers and sailors monument, the cost of which shall not exceed the sum hereby appropriated, and such other donations and contributions as may be derived from other sources, on the ground commonly known as Circle Park in the city of Indianapolis."

The seventh section authorizes the commissioners to appoint a secretary, who is required to give bond and take an oath of office, and whose compensation shall not exceed seventy-five dollars per month.

In support of the sufficiency of the complaint, it is argued that as no money can be drawn from the treasury, except in pursuance of an appropriation made by law (Constitution, section 3, article 10), and as the act under consideration makes no appropriation for the payment of official services, and other incidental expenses, the fair inference is, that the Legislature intended that all the expenditures incident to, or connected with, the erection of the monument, and chargeable against the State, should be paid out of the sum of \$200,000 specifically appropriated for its erection.

As has been shown, \$200,000 is appropriated for the purpose of *erecting* a monument, and the commissioners are directed to *build* a monument accordingly, on a particular tract of land belonging to the State, at a cost not to exceed that sum, except in so far as the amount may be increased by additional donations and contributions from other sources.

We construe these provisions to mean that the amount appropriated by the State must, so far as it may be used at all in that connection, be devoted to the *structural* work of the monument, and hence not to merely incidental expenses, which do not enter into the cost value of the edifice, and which must be otherwise paid. In this view, we are supported by the case of *Board, etc., v. Whittaker*, 81 Ind. 297.

This conclusion necessarily leads to an affirmance of the judgment appealed from, but it was the obvious intention of the complaint to also involve a construction of existing laws

Campbell v. Board of Comm'rs of the State Soldiers and Sailors Monument.

as to the manner in which the merely incidental expenses resulting from the erection of the monument may be paid, and as such a construction is incident to, and closely identified with, the conclusion reached by us, as above, we deem it proper to make some reference to the manner of paying such additional expenses.

It is true, as claimed, that no money can be rightfully drawn from the treasury except in pursuance of an appropriation made by law, but such an appropriation may be made impliedly, as well as expressly, and in general, as well as specific, terms. It may also be a continuing or fixed appropriation, as well as one for a temporary purpose or a limited period.

The use of technical words in a statute making an appropriation is not necessary. There may be an appropriation of public moneys to a given purpose without in any manner designating the act as an appropriation. It may be said generally, that a direction to the proper officer, or officers, to pay money out of the treasury on a given claim, or class of claims, or for a given object, may, by implication, be held to be an appropriation of a sufficient amount of money to make the required payments. *Ristine v. State, ex rel.*, 20 Ind. 328.

The eighth subdivision of section 5611, R. S. 1881, authorizes the auditor of state to "Draw warrants on the treasurer for all moneys directed by law to be paid out of the treasury to public officers, or for any other object whatsoever, as the same may become payable." * * *

This subdivision, when construed in connection with the act of 1887, clearly authorizes the auditor of state to draw his warrant on the treasurer of state for the merely incidental expenses incurred from time to time in the erection of the monument, to be paid out of the general fund when there is sufficient money in the treasury belonging to that fund to pay the amount for which the warrant is drawn.

The judgment is affirmed, with costs.

Filed Oct. 10, 1888.

Heaton *et al.* v. Shanklin *et al.*

No. 13,439.

HEATON ET AL. v. SHANKLIN ET AL.

115	505
119	507
122	584
115	505
125	354

FRAUDULENT CONVEYANCE.—*Action to Set Aside.*—*Good Faith Presumed.*—

Where a conveyance is assailed as fraudulent, good faith in the transaction is presumed, and such conveyance can not be impeached unless this presumption is overthrown.

SAME.—*Evidence.*—*Circumstances.*—*Inference.*—Such presumption may be overcome by circumstances, and the evidence is sufficient for that purpose if it supplies grounds for a legitimate inference.

From the Clinton Circuit Court.

T. H. Palmer, W. F. Palmer and J. Claybaugh, for appellants.

S. H. Doyal, P. W. Gard and J. C. Suit, for appellees.

ELLIOTT, J.—It is contended by the appellants' counsel that the evidence does not sustain the finding that the conveyances assailed by the appellees, as creditors of William C. Heaton, were fraudulent, because there is no proof of any corrupt intent. It is true, as counsel argue, that good faith is presumed, and that a conveyance can not be impeached unless this presumption is overthrown; but it is also true that the presumption may be overcome by circumstances, and that a voluntary conveyance may be declared fraudulent as to creditors, although there be no actual fraud. We think there is evidence in this case showing that the conveyances of William C. Heaton to his wife, Mary E. Heaton, were constructively fraudulent.

It is not necessary in any case that the evidence should be direct and positive; it is sufficient if it supplies grounds for a legitimate inference. *Indianapolis, etc., R. R. Co. v. Collingwood*, 71 Ind. 476. The evidence in this record supplies ground for inferring that the claims of the creditors were impaired, as well as for inferring all the other conclusions essential to a recovery.

Blackmer, Treasurer, v. The Home Insurance Co. of New York *et al.*

We agree with appellants' counsel that a husband, although in failing circumstances, may pay a debt due from him to his wife by conveying property to her; but we can not agree that the evidence is so clearly against the finding of the trial court that we must infer that it misapplied this rule.

We can not, of course, reject the evidence which the trial court deemed trustworthy, even though it is strongly contradicted.

Judgment affirmed.

Filed Oct. 10, 1888.

No. 14,193.

COMMONS v. COMMONS.

From the Rush Circuit Court.

J. B. Julian and *J. F. Julian*, for appellant.

W. A. Cullen and *C. E. Averill*, for appellee.

ZOLLARS, J.—This case is the same as the case of *Commons v. Commons*, ante, p. 162, except that the appeal in that case was by the defendant below, and the appeal here is by the plaintiff below. As the judgment in that case has been reversed, there must be a reversal here also, in order that the case may be tried upon a correct theory.

Judgment reversed, at appellant's costs, with instructions to the court below to grant a new trial, to grant leave to appellant to amend her complaint, and to proceed in accordance with this opinion.

Filed April 25, 1888.

No. 9894.

BLACKMER, TREASURER, v. THE HOME INSURANCE COMPANY OF NEW YORK ET AL.

From the Tippecanoe Circuit Court.

J. R. Carnahan and *D. P. Baldwin*, for appellant.

J. E. McDonald, *J. M. Butler*, *F. M. Finch* and *J. A. Finch*, for appellees.

HOWK, J.—By the record of this cause and the error assigned thereon, substantially the same questions are presented for decision as those which were considered and decided by this court in the recent cases of *State, ex rel., v. Insurance Co., etc.*, ante, p. 257, and *Blackmer v. Royal Ins. Co., etc.*, ante, p. 291. Upon the authority of the cases cited, the judgment is affirmed, with costs.

Filed June 22, 1888.

The Board of Commissioners of Wells County *et al.* v. Huffman.

No. 13,327.

THE BOARD OF COMMISSIONERS OF WELLS COUNTY ET AL.
v. JAMISON.

From the Wells Circuit Court.

J. S. Dailey, L. Mock, A. Simmons, E. R. Wilson and J. J. Todd, for appellants.

ELLIOTT, J.—Affirmed on the authority of *Board of Commissioners of Wells County v. Gruver*, ante, p. 224.

Filed June 15, 1888.

No. 13,325.

THE BOARD OF COMMISSIONERS OF WELLS COUNTY ET AL.
v. LATIMORE.

From the Wells Circuit Court.

J. S. Dailey, L. Mock, A. Simmons, E. R. Wilson and J. J. Todd, for appellants.

ELLIOTT, J.—Affirmed on the authority of *Board of Commissioners of Wells County v. Gruver*, ante, p. 224.

Filed June 15, 1888.

No. 13,352.

THE BOARD OF COMMISSIONERS OF WELLS COUNTY ET AL.
v. JAMISON ET AL.

From the Wells Circuit Court.

J. S. Dailey, L. Mock, A. Simmons, E. R. Wilson and J. J. Todd, for appellants.

ELLIOTT, J.—Affirmed on the authority of *Board of Commissioners of Wells County v. Gruver*, ante, p. 224.

Filed June 15, 1888.

No. 13,351.

THE BOARD OF COMMISSIONERS OF WELLS COUNTY ET AL.
v. HUFFMAN.

From the Wells Circuit Court.

J. S. Dailey, L. Mock, A. Simmons, E. R. Wilson and J. J. Todd, for appellants.

ELLIOTT, J.—Affirmed on the authority of *Board of Commissioners of Wells County v. Gruver*, ante, p. 224.

Filed June 15, 1888.

The Board of Commissioners of Wells County *et al.* v. Jamison.

No. 13,326.

THE BOARD OF COMMISSIONERS OF WELLS COUNTY ET AL.
v. LATIMORE.

From the Wells Circuit Court.

J. S. Dailey, L. Mock, A. Simmons, E. R. Wilson and J. J. Todd, for appellants.

ELLIOTT, J.—Affirmed on the authority of *Board of Commissioners of Wells County v. Gruver, ante*, p. 224.

Filed June 15, 1888.

No. 13,328.

THE BOARD OF COMMISSIONERS OF WELLS COUNTY ET AL.
v. MOUNSEY.

From the Wells Circuit Court.

J. S. Dailey, L. Mock, A. Simmons, E. R. Wilson and J. J. Todd, for appellants.

ELLIOTT, J.—Affirmed on the authority of *Board of Commissioners of Wells County v. Gruver, ante*, p. 224.

Filed June 15, 1888.

No. 13,350.

THE BOARD OF COMMISSIONERS OF WELLS COUNTY ET AL.
v. JAMISON.

From the Wells Circuit Court.

J. S. Dailey, L. Mock, A. Simmons, E. R. Wilson and J. J. Todd, for appellants.

ELLIOTT, J.—Affirmed on the authority of *Board of Commissioners of Wells County v. Gruver, ante*, p. 224.

Filed June 15, 1888.

No. 13,353.

THE BOARD OF COMMISSIONERS OF WELLS COUNTY ET AL.
v. JAMISON.

From the Wells Circuit Court.

J. S. Dailey, L. Mock, A. Simmons, E. R. Wilson and J. J. Todd, for appellants.

ELLIOTT, J.—Affirmed on the authority of *Board of Commissioners of Wells County v. Gruver, ante*, p. 224.

Filed June 15, 1888.

The Board of Commissioners of Wells County *et al.* v. Eaton.

No. 13,354.

THE BOARD OF COMMISSIONERS OF WELLS COUNTY ET AL.
v. MOUNSEY.

From the Wells Circuit Court.

J. S. Dailey, L. Mock, A. Simmons, E. R. Wilson and J. J. Todd, for appellants.

ELLIOTT, J.—Affirmed on the authority of *Board of Commissioners of Wells County v. Gruver, ante*, p. 224.

Filed June 15, 1888.

No. 13,355.

THE BOARD OF COMMISSIONERS OF WELLS COUNTY ET AL.
v. VAN CAMP.

From the Wells Circuit Court.

J. S. Dailey, L. Mock, A. Simmons, E. R. Wilson and J. J. Todd, for appellants.

ELLIOTT, J.—Affirmed on the authority of *Board of Commissioners of Wells County v. Gruver, ante*, p. 224.

Filed June 15, 1888.

No. 13,356.

THE BOARD OF COMMISSIONERS OF WELLS COUNTY ET AL.
v. POPEJOY.

From the Wells Circuit Court.

J. S. Dailey, L. Mock, A. Simmons, E. R. Wilson and J. J. Todd, for appellants.

ELLIOTT, J.—Affirmed on the authority of *Board of Commissioners of Wells County v. Gruver, ante*, p. 224.

Filed June 15, 1888.

No. 13,357.

THE BOARD OF COMMISSIONERS OF WELLS COUNTY ET AL.
v. EATON.

From the Wells Circuit Court.

J. S. Dailey, L. Mock, A. Simmons, E. R. Wilson and J. J. Todd, for appellants.

ELLIOTT, J.—Affirmed on the authority of *Board of Commissioners of Wells County v. Gruver, ante*, p. 224.

Filed June 15, 1888.

The Board of Commissioners of Wells County *et al.* v. Popejoy.

No. 13,358.

THE BOARD OF COMMISSIONERS OF WELLS COUNTY ET AL.
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From the Wells Circuit Court.

J. S. Dailey, L. Mock, A. Simmons, E. R. Wilson and J. J. Todd, for appellants.

ELLIOTT, J.—Affirmed on the authority of *Board of Commissioners of Wells County v. Gruver, ante*, p. 224.

Filed June 15, 1888.

No. 13,359.

THE BOARD OF COMMISSIONERS OF WELLS COUNTY ET AL.
v. POPEJOY.

From the Wells Circuit Court.

J. S. Dailey, L. Mock, A. Simmons, E. R. Wilson and J. J. Todd, for appellants.

ELLIOTT, J.—Affirmed on the authority of *Board of Commissioners of Wells County v. Gruver, ante*, p. 224.

Filed June 15, 1888.

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8. *Leasing Fair Grounds for Gambling Purposes.—Liability of Directors.—Indictment.*—An indictment which charges that the defendants, acting as officers, managers and directors of an agricultural society (naming it), which is a society organized under the laws of the State, did, on, etc., unlawfully rent, lease and donate a portion of the premises and grounds used and occupied by said society to one M. to be used for the purpose of carrying on a game of chance, with wheel of fortune, and dice, devices for the purpose of wagering money, is sufficient, on motion to quash, to charge an offence under the provisions of the act of April 4th, 1885. Acts 1885, p. 127. *State v. Johnson, 467*
9. *Supreme Court.—Judgment not Reversed if Evidence Tends to Sustain.*—The Supreme Court will not reverse the judgment in a criminal case if the evidence fairly tends to sustain it. *Delaney v. State, 499*
10. *Supreme Court.—Practice.—Evidence, Admission or Exclusion of.—Motion for New Trial.*—Alleged errors in the admission or exclusion of evidence must be presented below by a motion for a new trial, or they will not be considered on appeal. *Ib.*
11. *Appeal.—Instructions to Jury.*—A judgment will not be reversed because of the refusal of instructions, although they contain correct statements of the law, if the substance of them is contained in others given. *Ib.*
12. *Same.*—When all the instructions given by the court are not in the record, the Supreme Court will presume that the jury was properly instructed, and that the court by its instructions gave the substance of all proper instructions refused. *Ib.*
13. *Same.—Bill of Exceptions.—Instructions.*—In criminal cases, the only way by which instructions given or refused can be made part of the record is by embodying them in a bill of exceptions. *Ib.*
14. *Plea of Guilty.—Withdrawal of Plea.—Discretion of Court.*—Courts may, in their discretion, permit pleas of guilty to be withdrawn, or refuse to allow such withdrawal, and, except where there has been an abuse of such discretion, the Supreme Court will not interfere. *Myers v. State, 554*
15. *Same.—Withdrawal of Plea.—Abuse of Discretion of Trial Court.*—Where a prisoner, who is brought into court and arraigned on the same day an indictment is returned, being without counsel or means of employing them, and ignorant of his right to have counsel assigned him, acting in good faith upon an assurance from the prosecuting attorney that upon a plea of guilty the minimum punishment will be assessed, enters a plea of guilty, and punishment by imprisonment is thereupon adjudged against him eight years in excess of the minimum, he is entitled, upon motion made at the first opportunity thereafter, to a withdrawal of such plea, and the refusal of the court to sustain such motion is such an abuse of its discretion as will warrant the interference of the Supreme Court. *Ib.*

DAMAGES.

See BASTARDY, 1, 2; CHATTEL MORTGAGE, 1; COUNTY, 5, 6; GRAVEL ROAD, 3 to 5; INTOXICATING LIQUOR, 3 to 5; LANDLORD AND TENANT; MASTER AND SERVANT; NEGLIGENCE; RAILROAD, 3, 6, 9 to 13, 21; SLANDER, 5; TELEGRAPH COMPANY.

1. *Trespass.—Adverse Possession.—When Action to Recover Barred.*—Title acquired by an adverse occupancy for twenty years will defeat any claim that the original owner may have had for damages resulting from such occupancy. *Sherlock v. Louisville, etc., R. W. Co., 22*
2. *Railroad.—Deed to Right of Way.—Subsequent Encroachment Upon Adjoining Land of Grantor.—Construction and Repair of Road-Bed.—Negligence.*—A railroad company which has received a deed and paid the consideration for land upon which to construct and operate its road, is liable to the grantor for injuries subsequently caused to his land adjoining the right of way by the construction and repair of its road-bed in such a manner as to encroach thereon, without regard to any question of negligence on its part or knowledge that its works would cause the injury. *Roushlang v. Chicago, etc., R. W. Co., 106*

DEBTOR AND CREDITOR.

See CORPORATION, 1, 2; FRAUDULENT CONVEYANCE; JUDGMENT, 1.

1. *Preference of Creditors.—Husband and Wife.*—A debtor in failing circumstances has a right to prefer some of his creditors, including his wife, as against others, and such preferences will be upheld, if untainted with fraud. *Brigham v. Hubbard, 474*
2. *Fraudulent Conveyance.—Husband and Wife.—When Court of Equity will not Interfere.*—Where a conveyance from husband to wife is attacked as fraudulent, a court of equity will not interfere to set it aside, where, by such action, no benefit can accrue to the creditors of the former. *Ib.*

DECEDENTS' ESTATES.

See CORPORATION, 2; FRAUDULENT CONVEYANCE, 1; PRINCIPAL AND SURETY; SET-OFF, 4; WILL.

1. *Proceeding by Administrator to Sell Land to Make Assets.—Resistance by Owners.—Claim.—Practice.*—In a proceeding by an administrator to sell real estate to pay alleged claims against the estate, the owner or owners of the real estate have the right, in order to protect it, to defend against the proceeding, and the claims upon their merits, notwithstanding they may have been allowed by the administrator. *O'Haleran v. O'Haleran, 493*
2. *Administrator.—Action on Bond.—Pleading.—Complaint.*—In an action by an administrator on the bond of his predecessor, a complaint is sufficient which shows that the former administrator received money from the sale of the real estate of his intestate, for which he has refused to account, and that he still has the money in his hands. *Lindley v. State, ex rel., 502*
3. *Final Settlement.—Notice.—Jurisdiction.—Collateral Attack.*—The filing of his final account by an administrator confers jurisdiction upon the court to hear all matters pertaining or incidental to the final settlement of the estate, and where notice has been given of such filing by the clerk, however defective in form, the action of the court in the final settlement and distribution of the surplus can not be attacked in a collateral proceeding. *Jones v. Jones, 504*
4. *Same.—Distribution of Surplus to Heirs.—Practice.*—Jurisdiction over the subject of distribution of the surplus of an estate to the heirs results as an incident to the final settlement, without additional notice, and while issues may be formed upon adverse claims growing out of distribution, it is not essential that they should be. *Ib.*

DEED.

See DAMAGES, 2; EVIDENCE, 4; FRAUDULENT CONVEYANCE; QUIETING TITLE; RAILROAD, 21; SHERIFF'S SALE, 7.

1. *Estate Tail.—Conditional Fee.—Void Limitation Over.*—In 1855, B. executed a warranty deed conveying land to his granddaughter for an expressed money consideration. Following the description was written a stipulation that if the grantee should die, leaving no children, the land, or its proceeds that might be realized by sale or otherwise, should revert to the lawful heirs of the grantor; and, also, if the guardian of the grantee saw fit to sell the land, he could do so, by appropriating the proceeds of the sale to the use of the grantee while she should live, and then applying the balance, if she should die without heirs of her body, to the heirs of the grantor. The grantee died in 1883, while in possession of the land, leaving no children, but leaving a husband and mother as her only heirs at law.

Held, that the estate created in the grantee is not an estate tail, but a conditional fee, liable to be defeated only by the two contingencies, (1) that the grantee should die childless, and (2) that the grantor, prior to that event, should have died leaving lawful heirs competent to take the estate limited over.

Held, also, that as the deed disposes of the entire estate, with no reversion to the grantor, there can be no remainder, and that for this reason, and for the additional reasons that there was no person in being competent to take the conditional estate limited over, and that the deed confers upon the grantee a general power of disposition, the limitation over is void and the estate of the first taker became a fee simple absolute.

Outland v. Bowen, 150

2. *Real Estate.—Conveyance.—Mortgage.—Presumption.*—The presumption is that an instrument is what it purports to be; and a deed, absolute on its face, will operate as a conveyance of the fee, unless the evidence proves it to be a mortgage.

Rogers v. Beach, 413

3. *Same.*—A deed can not be regarded as a mortgage where there was in fact a sale of the property for an agreed price, which was paid in full by the grantees, and where the property was in no possible contingency to revert in the grantors.

Ib.

4. *Same.*—It is not sufficient to transform a deed into a mortgage to prove that at the time it was made the parties agreed that, in the event the property should be sold for more than its agreed price, the grantors should receive such increased price.

Ib.

DEMAND.

See REAL ESTATE, 3.

DESCRIPTION OF REAL ESTATE.

See MORTGAGE, 1 to 3, 9, 10.

DEVISE.

See LANDLORD AND TENANT; REAL ESTATE, 5; WILL.

DISCRETIONARY POWER.

See BASTARDY, 5; CONTINUANCE, 1, 2; CRIMINAL LAW, 14, 15.

DOMESTIC RELATIONS.

See GUARDIAN AND WARD; MARRIED WOMAN; MASTER AND SERVANT.

DONATION TO RAILROAD COMPANY.

See RAILROAD, 15 to 20.

DRAINAGE.

1. *Constitutional Law.*—Section 7, Act March 8th, 1883, Constitutional.—Section 7 of the drainage law of March 8th, 1883 (Acts 1883, p. 180), was a constitutional and valid enactment. *Dunkle v. Herron, 470*
2. *Statute.*—*Repealing Enactment of Act of April 6th, 1885.*—*Saving Clause.*—Under the repealing section of the drainage act of April 6th, 1885, which repealed the act of March 8th, 1883, all assessments for work done under the latter act were unaffected by the repeal, and were enforceable according to the provisions of the law under which they were made. *Ib.*
3. *Constitutional Law.*—*Statute.*—*Constitutionality of Section 10 of Drainage Act of 1885.*—Section 10 of the drainage act approved April 6th, 1885, is constitutional. *Johnson v. Lewis, 420*
4. *Repair of Ditches.*—*County Surveyor.*—*Disqualification of, on Account of Interest, etc.*—*Statute Construed.*—A county surveyor has no power to act, in the repair of ditches under the provisions of section 10 of the drainage law of April 6th, 1885, where lands owned by him, or by persons related to him within the prohibited degrees of consanguinity, are benefited by, and liable to assessment for, such repairs. In such case he should report his disability to the board of county commissioners, who must appoint a deputy to act. *Kelly v. Hockett, 10 Ind. 299*, overruled to the extent that it conflicts with this opinion. *Markley v. Rudy, 535*
5. *Same.*—*Appeal from Surveyor's Assessment.*—*Separate Appeal.*—*What May be Considered on Appeal.*—Under the provisions of section 10 of the drainage law of April 6th, 1885, any person feeling himself aggrieved may separately appeal from any assessment made under that section, and on such appeal the question as to the competency of the surveyor to make the assessment, and all kindred questions, may be examined, either as preliminary or incidental to the trial on its merits. *Ib.*
6. *Proceedings in Circuit Court.*—*Remonstrance.*—*Filing in Clerk's Office.*—*Practice.*—Where, in a drainage proceeding in the circuit court, a remonstrance is filed in the clerk's office within ten days after the report of the commissioners has been made, but without notice to or leave of court, and is not presented to the court at that term, although in session for more than ten days after the filing of such report, the establishing of the drain, and confirmation of the assessments, and a refusal to entertain such remonstrance at the ensuing term is not erroneous. *Gilbert v. Hall, 549*

EJECTMENT.

See JUDGMENT, 3; RAILROAD, 2 to 8.

EMPLOYER AND EMPLOYEE.

See MASTER AND SERVANT.

ESCAPE OF PRISONER.

See BASTARDY, 1, 2.

ESTATE TAIL.

See DEED, 1.

ESTOPPEL.

See CORPORATION, 1, 2; MECHANIC'S LIEN, 2; MORTGAGE, 3, 7; PARTNERSHIP, 2; RAILROAD, 3, 8, 13; REAL ESTATE, 6.

EVIDENCE.

See BASTARDY, 2, 6; COUNTY, 6; CRIMINAL LAW, 4 to 6, 10; FRAUDULENT CONVEYANCE, 3 to 5, 8; GUARDIAN AND WARD, 3; INTOXICAT-

ING LIQUOR, 1, 2; MASTER AND SERVANT, 5, 6, 9, 10; SLANDER, 2 to 5; SUPREME COURT, 2, 9; VERDICT, 1.

1. *Physician and Patient.—Knowledge Acquired in Discharge of Professional Duty.—Will.—Action to Set Aside.*—In an action to set aside a will, it is not competent, if objection be made, for a physician who attended the testator in his last illness to testify as to his mental and physical condition, from knowledge acquired by him while in the discharge of professional duty. Section 497, R. S. 1881.
Heuston v. Simpson, 62
2. *Striking Out.*—Where a part of the testimony of a witness is competent and a part incompetent, it is not error to overrule a motion to strike out such testimony as a whole.
Binford v. Young, 174
3. *Admission in Treaty of Compromise.*—An admission of an independent fact, made in the course of a conversation relating to a compromise, but not made for the purpose of securing a compromise, is admissible in evidence.
Ib.
4. *Endorsement of Recorder on Deed or Mortgage.*—An endorsement made and signed by a recorder, on a deed or mortgage, stating the date of the reception of the instrument for record and the fact of its being recorded in a certain book, may, in the absence of better evidence, be read in evidence touching the matters to which it relates, in connection with such instrument.
Moore v. Glover, 367
5. *Offer of Compromise.—Admissions.*—A letter written by a plaintiff, prior to the commencement of his action, and containing admissions made simply to open the way to a compromise, or as a part of an attempted compromise, is not admissible against him.
Louisville, etc., R. W. Co. v. Wright, 378
6. *Physician.—Opinion as to Probable Effect of Injuries.*—It is competent for an attending physician, after stating the character and condition of the injuries sued for, to give his opinion as to the probable results of such injuries, although he did not continuously attend the injured person to the time of the trial, and it is also competent to embody the facts stated by him in a hypothetical question put to another physician.
Ib.
7. *Practice.—Civil Action.—Preponderance of Evidence.*—In civil actions a preponderance of the evidence only is necessary to establish the affirmative of an issue, whatever the nature of that issue may be.
Reynolds v. State, ex rel., 421
8. *Declarations Expressive of Suffering.*—In an action for damages for personal injuries, the injured party may show in evidence declarations connected with existing suffering and expressive of it, though he may not prove his declarations giving an account of the manner in which the injuries were received, or recounting what is past.
Board, etc., v. Leggett, 544

EXAMINATION OF WITNESS.

See CRIMINAL LAW, 4 to 6; SUPREME COURT, 2.

EXECUTION.

See APPEAL BOND; CHATTEL MORTGAGE; EXEMPTION FROM EXECUTION; PARTNERSHIP; SET-OFF, 2.

1. *Levy.—Sale.—Value of Property.—Satisfaction of Judgment.*—A levy upon personal property of the judgment debtor of sufficient value to satisfy the execution, is merely *prima facie* payment of the judgment, and if a sale regularly made fails to produce enough to pay the debt, the parties can not, while the sale stands unimpeached, have the judg-

ment declared satisfied upon extraneous proof that the property sold was of sufficient value to satisfy it. *Dehority v. Paxon, 124*

2. *Same.—Chattel Mortgage.—Foreclosure.—Value of Property Fixed by Highest Bid.*—When a chattel mortgage has been foreclosed, either by proceedings in chancery or in pursuance of a power, the price paid by the highest bidder at an unimpeached sale regularly made, will, in the absence of fraud, be presumed to have conclusively fixed the value of the property for the purpose of being applied to the debt, and if it be insufficient for payment, there may be a new execution for the residue. *Ib.*

EXECUTORS AND ADMINISTRATORS.

See CORPORATION, 2; DECEDENTS' ESTATES; FRAUDULENT CONVEYANCE, 1; WILL, 2.

EXEMPTION FROM EXECUTION.

See SET-OFF, 2.

Law Governing.—Bankruptcy.—Revivor of Discharged Debt.—Promissory Note.—Where a debtor, who was discharged in bankruptcy in 1879, afterwards, in 1880, executes a new note for a debt from which he was released by the discharge, the original debt is revived, but only as of the date of the new note; and where a judgment is obtained upon such note, the debtor is entitled to claim an exemption of six hundred dollars, as provided by the law in force at the time of its execution. *Willis v. Cushman, 100*

EXPERT AND OPINION EVIDENCE.

See EVIDENCE, 6.

FENCE.

See RAILROAD, 14.

FORECLOSURE.

See EXECUTION; MECHANIC'S LIEN; MORTGAGE; RAILROAD, 15, 20; REAL ESTATE, 6; TRIAL, 1, 6.

FOREIGN CORPORATIONS.

See INSURANCE, 1 to 7.

FORFEITURE OF FRANCHISE.

See RAILROAD, 2.

FRAUD.

See DEBTOR AND CREDITOR; FRAUDULENT CONVEYANCE; REPLEVIN; SALE; STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE.

See DEBTOR AND CREDITOR; TRIAL, 7.

1. *Decedents' Estates.—Administrator.—Conversion.—Setting Aside Conveyance.—Judgment.—Principal and Surety.*—An administrator *de bonis non*, who has obtained a judgment against his insolvent predecessor and his sureties for the conversion by the former of the assets of the estate, may, without proceeding to collect such judgment from the sureties, and without alleging that there are unpaid claims against the estate, maintain an action to set aside a conveyance, which the defaulting administrator had fraudulently made to his children, of land purchased by him with the trust funds, and to subject such land to the satisfaction of the judgment lien. *Duffy v. State, ex rel., 351*
2. *Action to Set Aside.—Insolvency of Debtor Must be Shown.*—In an action to set aside a conveyance by a debtor as fraudulent, where there is no specific lien on the property conveyed, and no return of *nulla bona* on

an execution issued, it is essential that proof should be made that the grantor debtor was insolvent, and that he did not have other property subject to execution at the time he made the deed which is assailed.

Towns v. Smith, 480

3. *Same.—Evidence.—How Insolvency of Debtor May be Proved.—Practice.*—In such cases, courts of equity do not generally set aside conveyances made by a debtor until the creditor has exhausted all his legal remedies for the collection of his debt; but where it appears that the debtor has fraudulently conveyed all his property subject to execution and that the ordinary legal processes would be futile, it is not required that the creditor shall resort to useless formalities or unavailing remedies. *Ib.*
4. *Same.—Evidence.—Tax List Admissible.—Purpose of Admission.*—Where the amount of property owned by a party is in controversy, a tax list returned by him to the assessor, under oath, purporting to give a full list of all his personal property, etc., is admissible in evidence against him, for the purpose of showing the particular articles of personal property, etc., owned or claimed by him at the time of such return, and to impeach his testimony given at the trial. *Ib.*
5. *Fraud.—Fraudulent Intent.—Must be Proved.—Presumption.*—The question of fraudulent intent is in all cases a question of fact, which can not be presumed, but when it is averred must be proved and found. *Neisler v. Harris, 560*
6. *Same.—Conclusion of Law.—Practice.*—In an action attacking a conveyance as fraudulent, when the special finding of facts by the trial court does not disclose the existence of fraud or fraudulent intent in the conveyance, the plaintiff is not entitled to a conclusion of law thereon, nor a judgment in his favor. *Ib.*
7. *Action to Set Aside.—Good Faith Presumed.*—Where a conveyance is assailed as fraudulent, good faith in the transaction is presumed, and such conveyance can not be impeached unless this presumption is overthrown. *Heaton v. Shanklin, 595*
8. *Same.—Evidence.—Circumstances.—Inference.*—Such presumption may be overcome by circumstances, and the evidence is sufficient for that purpose if it supplies grounds for a legitimate inference. *Ib.*

FREE GRAVEL ROAD.

See GRAVEL ROAD; TAXES.

GAMING.

See CRIMINAL LAW, 8.

GRANTOR AND GRANTEE.

See DAMAGES, 2; DEED; FRAUDULENT CONVEYANCE; MORTGAGE, 4; NOTICE, 1; RAILROAD, 21.

GRAVEL ROAD.

See TAXES.

1. *Construction of.—Additional Assessment.—Notice.—Injunction.*—Where the board of county commissioners has made a final order levying an assessment for the construction of a gravel road, it exhausts its jurisdiction to assess land under the original notice, and an additional assessment, if the first proves insufficient, can not subsequently be levied against property-owners without a new notice, and, if levied, its collection may be enjoined. *Board, etc., v. Gruver, 224*
Board, etc., v. Jamison, and others, 597 to 600
2. *Same.—Pleading.*—An averment that no notice whatever was given of

the levying of an assessment is not the statement of a mere conclusion, but the statement of a material fact. *Ib.*

3. *Contractor's Bond.—Action Upon.—Complaint.*—A complaint by the board of county commissioners upon a bond executed by a gravel road contractor to secure the performance of his contract, alleging a failure of the contractor to complete the work as agreed, is bad as to all the defendants if it fails to allege that the board had performed its part of the contract, or to show a sufficient excuse for its non-performance, the cause of action being primarily founded upon the contract. *Board, etc., v. Hill, 316*
4. *Same.—Estimates.—Withholding Money From Contractor.*—Where the contract for the construction of a gravel road stipulates that the engineer in charge of the construction of the work shall give the contractor estimates at the end of each thirty days, upon which the latter shall be paid a certain per cent. of the amount due for work done, the fact that money to which the contractor is entitled for work already performed is withheld, whereby he is prevented from completing the work as agreed, is a good defence to an action upon the bond given by him to secure the performance of his contract. *Ib.*
5. *Same.—Misconduct of Engineer.—Damages.—Liability of County.*—A county is not liable to a gravel road contractor for damages sustained by him by reason of the failure of the engineer in charge of the construction of the work to give him sufficient estimates, or for other delinquencies on his part, whereby such contractor is prevented from completing the road and is deprived of the profits which would have accrued to him. *Ib.*

GUARDIAN'S BOND.

See GUARDIAN AND WARD.

GUARDIAN AND WARD.

See MECHANIC'S LIEN.

1. *Bond.—Liability Where no Penalty is Expressed.—Surety.*—Under section 2516, R. S. 1881, a guardian's bond is valid and enforceable, even as against a surety, although no penalty is expressed therein, and a recovery may be had for all losses resulting from any breach of the guardian's duty. *Britton v. State, ex rel., 55*
2. *Same.—Infant Relator.—Poor Person.—Next Friend.*—Under section 260, R. S. 1881, an infant relator, without means, may be admitted to prosecute an action upon a guardian's bond as a poor person, and without the procurement of a next friend to appear therein, as required by section 256. *Ib.*
3. *Same.—Non est Factum.—Admission of Bond in Evidence.*—Although a defendant denies under oath the execution of a bond in suit, and claims that it was delivered without authority, yet if his signature is admitted to be genuine, and it appears that the bond was taken, approved and filed by the clerk many years prior to the action, its admission in evidence is authorized. *Ib.*

HIGHWAY.

See GRAVEL ROAD; NEGLIGENCE, 1 to 4.

1. *Obstruction of.—Railroads.—Practice.—Mandate.—Statute Construed.*—The provisions of section 3903, R. S. 1881, confer upon a railroad company, duly incorporated, authority to construct its railroad track over and across a public highway; but such company is required to restore such highway to its former state, in a sufficient manner not to unnecessarily impair its usefulness, and the performance of such duty may be compelled by mandate.

Cummins, Trustee, etc., v. Evansville, etc., R. R. Co., 417

2. *Same.—Statute Construed.*—The provisions of section 23 of "An act concerning highways," passed March 2d, 1883 (Acts 1883, p. 62), do not apply to a case where a railroad company, having constructed a track upon a public highway, fails to restore such highway to its former condition of usefulness, and in such case an action for the statutory penalty provided for in such section will not lie. *Ib.*

HUSBAND AND WIFE.

See DEBTOR AND CREDITOR, 2; MARRIED WOMAN; MORTGAGE, 11, 12.

INDICTMENT.

See CRIMINAL LAW, 8.

INFANT.

See GUARDIAN AND WARD; MECHANIC'S LIEN.

INJUNCTION.

See GRAVEL ROAD, 1, 2; PARTNERSHIP; RAILROAD, 3, 8; TAXES.

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 11 to 13; MASTER AND SERVANT, 10; MUNICIPAL CORPORATION, 2; NEGLIGENCE, 17; SUPREME COURT, 1.

1. *Refusal to Give.—Presumption.*—Where the evidence is not in the record, it will be presumed that instructions which the trial court refused to give, on request, were refused because not applicable to the case made by the evidence. *Silver v. Parr, 113*
2. *Must be Signed by Judge.—Practice.*—Under the sixth clause of section 533, R. S. 1881, neither instructions requested by a party and refused by the court, nor those given by the court of its own motion, can be made a part of the record unless signed by the trial judge. *Ib.*
3. *Making Part of Record.*—Where the transcript on appeal contains a complete series of instructions, at an appropriate place, consecutively numbered, signed by the judge, filed, and with a proper caption, on the margin of each of which there is a memorandum that it was given and excepted to, also signed by the judge, such instructions are, under section 535, R. S. 1881, properly in the record without a bill of exceptions or order of court, and the presumption is that they were all the instructions given by the court. *Lower v. Franks, 334*
4. *Same.—Erroneous.—Withdrawal.*—The giving of a fatally erroneous instruction can only be cured by a plain withdrawal of the instruction. A withdrawal will not be presumed, but must be affirmatively shown. *Ib.*
5. *Overhead Bridge.—Negligence.—Practice.*—For a consideration of instructions touching the principles involved in an action for injuries caused by an overhead bridge, and also for a statement of rules of practice relating to the bringing of instructions into the record and their consideration on appeal, see opinion. *Louisville, etc., R. W. Co. v. Wright, 378*

INSURANCE.

1. *Foreign Insurance Companies.—Moneys Due to State From.—Relator.*—While no relator is necessary in an action to recover moneys due to the State from foreign insurance companies doing business within the State; yet the action will also be well brought either on the relation of the attorney general or auditor of state. *State, ex rel., v. Insurance Co., 257*
2. *Same.—Power of State to Regulate.—Constitutional Law.*—A State may impose upon foreign insurance companies, as a condition of coming into or doing business within its territory, any terms, conditions and

restrictions that are not repugnant to the Constitution and laws of the United States. *Ib.*

3. *Same.—Retaliatory Laws.*—Section 3 of the act of March 3d, 1877 (section 3773, R. S. 1881), which provides that where obligations or prohibitions are, by the laws of any other State, imposed upon insurance companies of this or other States, greater than are required by the laws of this State, then such obligations or prohibitions shall be imposed upon insurance companies of that State doing business here, is constitutional and enforceable. *Ib.*
4. *Same.—Taxation.—License Fees.*—Moneys which become due to the State from any foreign insurance company under the provisions of such retaliatory statute, whether regarded as taxes for revenue or as license fees, are due and payable as a part of the terms or conditions of its entering this State and transacting business within its limits, and such statute is not within the constitutional restrictions relating to taxation. *Ib.*
5. *Same.—Statutes of Other States.—Must be Pleaded.*—The laws of other States upon the subject of insurance, such as are contemplated by the retaliatory statute of this State, are not adopted or enacted into the law of this State, but are merely facts, and as such must be pleaded and proved. *Ib.*
6. *Foreign Insurance Companies.—Retaliatory Statute.—Constitutionality.*—Section 3 of the act of March 3d, 1877 (section 3773, R. S. 1881), regulating foreign insurance companies doing business in this State, and containing provisions of a retaliatory character, is constitutional and valid.
Blackmer v. Royal Ins. Co., 291
Blackmer v. Home Ins. Co., 596
7. *Same.—City.—Right to Recover Per Cent. of Premiums for Use of Fire Department.*—Neither such section 3 of the act of 1877, nor any other statute of this State, authorizes a city or town to recover from a foreign insurance company, for the use of its fire department, a per cent. of the premiums received from risks taken upon property within the municipality, as provided by the laws of the State where such company was incorporated, or where, being organized abroad, it has its principal agency, as the entire regulation of such companies and the collection of taxes therefrom are committed by the laws of this State to the State officers. *Ib.*
8. *Suspension of Company.—Promissory Note.—Failure of Consideration.*—Where a person contracts for insurance for five years, pays the first year's premium in money, and executes a promissory note, payable in yearly instalments, for the balance, if the company issuing the policy becomes insolvent and suspends business before the expiration of the first year, the note can not be enforced, there being a failure of consideration.
Home Ins. Co. v. Daubenspeck, 306

INTEREST.

See BASTARDY, 5.

INTERFERENCE WITH OFFICER.

See METROPOLITAN POLICE.

INTOXICATING LIQUOR.

1. *Unlawful Sale.—Proof.*—Upon an appeal from a conviction for unlawfully selling intoxicating liquor, the fact that the State did not prove the names of the alleged purchasers is immaterial if it appears that the defendant himself made such proof. *Stolte v. State, 128*
2. *Weight of Evidence.—Reversal of Judgment.*—A judgment will not be reversed upon the weight of conflicting evidence. *Ib.*

3. *Act of 1875.—Sale to Intoxicated Person.—Damages.—Civil Action.—Right to Maintain.*—The right to prosecute a civil action under sections 15 and 20 of the act of 1875 (1 R. S. 1876, p. 869), to recover damages sustained by the sale of alcoholic liquors to a person in a state of intoxication, is not affected by section 2092, R. S. 1881, subsequently enacted. *Mulcahey v. Givens, 286*
4. *Same.—Proximate Cause of Injury.*—Where intoxicating liquor is sold to a person at the time intoxicated, who, by reason of the effect thereof, becomes unable to manage the horses drawing himself and wife homeward, but refuses to relinquish the reins to his wife, whereby the vehicle in which they are riding is overturned, and both are injured, the sale of the liquor is such a proximate cause of the injuries as entitles the wife to maintain an action under the act of 1875 for damages. *Ib.*
5. *Same.—Action Against Vendor Personally.—Bond.*—An action against a licensed vender under the act of 1875 for damages resulting from the sale of intoxicating liquor to an intoxicated person, may be maintained either against the vender personally or upon his bond. *Ib.*

JEOPARDY.

See CRIMINAL LAW, 1, 2.

JUDGMENT.

See APPEAL BOND; BASTARDY, 1; EXECUTION; FRAUDULENT CONVEYANCE, 1; MORTGAGE, 7; NEGLIGENCE, 2; QUIETING TITLE; SET-OFF, 2, 4; SHERIFF'S SALE.

1. *General Lien of.—Prior Equities.*—The general lien of a judgment upon the lands of the debtor is subject to all prior equities existing against such lands in favor of third persons; and a court of equity will limit the lien to the actual interest of the judgment debtor in the property. *Justice v. Justice, 20*
2. *Judgment Rendered upon Unlawful Agreement.—Validity of.*—Where a judgment, fair and regular upon its face, has been entered by agreement of the parties adversely claiming an office, such judgment is binding until reversed upon appeal or set aside by a direct proceeding, although the agreement upon which it was entered may have been corrupt and unlawful. *Mannix v. State, ex rel., 245*
3. *Conclusiveness of.—Failure to Cover all the Issues.—Ejectment.—Quieting Title.*—Where, in a suit to recover possession of real estate and to quiet title, judgment is given against one defendant, following which is a recital that the rights of the other defendants have not been adjudicated, the recital is not conclusive, but the effect of the judgment is to be determined by the issues and finding in the case. *People's Savings, etc., Ass'n v. Spears, 297*
4. *Amendment of Judgment.—Practice.*—The sufficiency of a judgment, as to matter of form, can not be questioned by a motion for a new trial assigning as a cause that the judgment is contrary to law; nor is such a motion a proper method by which to secure a modification or amendment, but the remedy is by a special motion for that purpose, questions on which are to be saved by bill of exceptions. *Ib.*
5. *Against Part of Defendants.—Joint and Several Liability.—Pleading.*—Under section 570, R. S. 1881, every complaint against two or more defendants, whether founded upon contract or tort, will be treated as both joint and several, and, although the complaint may allege a joint liability, the plaintiff will be entitled to judgment against part of the defendants if he proves a cause of action against them and not against all. *Lower v. Franks, 334*
6. *Agreement of Parties.—Supreme Court.—Appeal.*—Where a judgment is taken, which is a specific lien on certain real estate, in pursuance of

an agreement that no order of sale shall issue until an appeal pending in the Supreme Court from another judgment against the defendant shall be disposed of, and that the judgment first named shall be annulled in the event of a decision favorable to the defendant, on the merits of the cause appealed, but shall otherwise be collectible; and where afterwards such appeal is dismissed, without further agreement as to the judgment unappealed from, there is nothing in the original agreement which will prevent the collection of that judgment by the sale of the real estate upon which it is a lien. *Root v. Burton*, 495

JUDICIAL SALE.

See QUIETING TITLE; SHERIFF'S SALE.

JURISDICTION.

See BASTARDY, 3, 4; COUNTY, 1, 2; DECEDENTS' ESTATES, 3, 4; PRACTICE, 5; TAXES.

Circuit Court.—Want of Jurisdiction Matter of Defence.—The circuit court is presumed to have jurisdiction of causes it assumes to try, and want of jurisdiction is a matter of defence. *Board, etc., v. Leggett*, 544

JUROR.

Sheriff's Employee.—Incompetency of.—Criminal Cause.—A person employed by a sheriff to serve subpoenas for witnesses in a criminal prosecution, is the agent, and, in a qualified sense, the deputy of such officer, and is incompetent to act as a juror in such cause.

Zimmerman v. State, 129

JURY.

See INSTRUCTIONS TO JURY; JUROR; TRIAL.

JUSTICE OF THE PEACE.

See BASTARDY, 3, 4; CRIMINAL LAW, 3.

LANDLORD AND TENANT.

See REAL ESTATE, 5.

1. *Invalid Contract to Devise Land.—Repairs Made by Tenant.—Liability of Landlord.*—Where one goes into possession of land under an oral agreement with the owner by which the latter is to erect a house thereon and devise the land to him, he in the meantime to pay rent for the premises, the relation of landlord and tenant exists, and the occupant can not, upon the owner failing to erect the house, charge the owner with the cost of repairs made at the latter's solicitation upon a house already on the land, unless he has agreed to pay therefor. *Hopkins v. Balliff*, 213
2. *Same.—Failure of Landlord to Erect House as Agreed.—Remedy of Tenant.*—In such case, if the failure to build the house as agreed resulted in damages to the tenant by reducing the value of the leasehold, his remedy is an action for such damages; or he might have erected the house and recovered the cost. *Ib.*

LICENSE.

See NEGLIGENCE, 6.

LIEN.

See ATTORNEY AND CLIENT; CHATTEL MORTGAGE; JUDGMENT; MECHANIC'S LIEN; MORTGAGE; QUIETING TITLE, 1; REAL ESTATE, 6; SHERIFF'S SALE, 3, 7; TAXES.

LIMITATION OF ACTIONS.

See DAMAGES, 1; RAILROAD, 4 to 7, 12; REAL ESTATE, 1, 2; WILL, 1.

LIQUOR SELLER'S BOND.

See INTOXICATING LIQUOR, 3 to 5.

LIS PENDENS.

See NEW TRIAL, 2.

MALPRACTICE.

See NEGLIGENCE, 5.

MANDAMUS.

See HIGHWAY, 1; OFFICE AND OFFICER, 1; RAILROAD, 15.

MARRIED WOMAN.

See MORTGAGE, 11, 12.

Contract.—Liability for Medical Services.—Under section 5115, R. S. 1881, removing the disabilities of married women to make contracts, coverture is not a defence to an action by a physician for medical services rendered to a wife at her request and upon her promise to pay for the same. *Elliott v. Gregory, 98*

MASTER AND SERVANT.

1. *Railroad.—Negligence.—Overhead Bridges.—Brakeman.*—One entering the service of a railroad company as brakeman has the right to assume that the company has constructed and maintained its roadway and bridges in such a manner that he can perform his duties with reasonable safety, and that if there is a low bridge or any such danger to be encountered in the service, he will be warned of it. *Louisville, etc., R. W. Co. v. Wright, 378*
2. *Same.—Duty of Master to Inform Employee of Unusual Risk.*—Where there are dangers and hazards known to the master, or of which he ought to have knowledge by the use of ordinary care, and which are not ordinarily and usually incident to the business, it is his duty to inform the employee of such danger when hiring him, unless the danger is so apparent that the latter will be bound to take notice of it. *Ib.*
3. *Same.—Assumption of Risk by Brakeman.—Unusual Dangers.*—A person contracting to work upon a railroad as brakeman assumes the risks ordinarily and properly incident to such service, but he does not assume the risk of unusual dangers, such as result from low overhead bridges, of the perilous character of which he has no knowledge, or of which he is not bound to take notice. *Ib.*
4. *Same.—Negligence to Maintain Low Bridge.*—A railroad company which constructs and maintains a bridge over its track so low that a brakeman can not, while his train is passing thereunder, walk or stand upon the cars, or even apply the brakes, without injury, is guilty of negligence, and liable to one who, having no knowledge of the peril, is injured while in the discharge of his duty. *Ib.*
5. *Same.—Maintenance of Low Bridges by Other Railroads.—Evidence.*—In such a case, evidence that there are bridges on all railroads in the United States too low for brakemen, standing or walking upon ordinary box-cars, to pass under with safety, is not competent. *Ib.*
6. *Same.—Evidence of Injury to Other Persons.—Notice to Company of Dangerous Character of Bridge.*—Evidence that other persons were previously injured by coming in contact with the bridge, while passing thereunder upon moving trains, is competent as showing notice on the part of the railroad company that the bridge was dangerous. *Ib.*
7. *Negligence.—Railroad.—Diligence Required in Selecting Employees.—Competency of Employees.*—It is the duty of a railroad company to exercise reasonable and ordinary diligence in the selection of its employees,

having respect for the exigencies of the particular service required, to the end that it may ascertain their competency and fitness to be entrusted in such service. *Evansville, etc., R. R. Co. v. Guyton, 450*

8. *Same.—Liability of Employer for Incompetence of Employee.—Injury to Co-Employee.*—In case an employee proves to be incompetent for the duty assigned him, and ordinary care has not been used in his selection, or if he be retained after notice of his incompetency, the employer will be liable to a co-employee whose injury results proximately from the lack of qualification of the fellow-servant, unless the person injured had notice of the incompetency or had equal opportunities with the employer to obtain notice. *Ib.*
9. *Same.—Evidence.—Character of Injury, etc.*—In an action for personal injuries alleged to have been occasioned by the wrong of another, the plaintiff may give testimony showing the character and extent of his injury, the nature and intensity of the suffering therefrom; and, where the injury resulted from a railroad accident, testimony that the plaintiff immediately after the injury walked a quarter of a mile to flag another train, and became unconscious from loss of blood, pain and exhaustion, resulting from the injury, is admissible. *Ib.*
10. *Evidence.—Proof of Specific Acts of Incompetent Employee.*—In such case, where the injury is claimed to have been caused by the incompetency of an employee of the defendant, an instruction to the jury that "any evidence tending to show a specific act of incompetence is only admissible for the purpose of showing that the defendant had not exercised due care in the employment of, or retaining in service such employee, and to bring notice to the defendant of incompetence," was correctly refused. *Ib.*
11. *Latent Defects in Implements of Labor.—Duty and Liability of Master.*—If an employee, reposing confidence in the prudence and caution of the employer, relies upon the adequacy of implements put into his hands to work with, and upon the safety of the place assigned him to work, and sustains injury in consequence of the failure or neglect of the employer to disclose latent defects or perils which the latter knew, or which he should have known of by the exercise of reasonable diligence, the employee is entitled to remuneration for his loss. *Jenney Electric Light, etc., Co. v. Murphy, 566*
12. *Same.—Master not an Insurer.—Tools and Appliances.—Dangerous Service.*—The employer is not an insurer against injury, nor is he required to furnish tools or appliances of the best or most approved design, safe beyond any peradventure or contingency; but he engages that he will not expose the employee to danger which is not obvious, or of which the latter has no knowledge or adequate comprehension, and which is not reasonably incident to and within the ordinary risks of the service undertaken. *Ib.*
13. *Same.—Use of Obviously Defective Implement.*—If an employee voluntarily, without specific command as to time and manner, uses an obviously defective implement, the defect being alike open to the observation and within the comprehension of employer and employee, both stand upon common ground, and no recovery can be had for a resulting injury to the latter. *Ib.*
14. *Same.*—Where an employee has within his own control the manner of using an obviously defective tool, and the means of securing safety if he chooses to employ them, if he neglects the means of security to himself he thereby elects to take the risk, and can not recover for a resulting injury. *Ib.*

MECHANIC'S LIEN.

See REAL ESTATE, 6.

1. *Infant.—Quieting Title.*—A mechanic's lien can not be acquired against the property of an infant, for improvements made thereon, and his guardian may maintain a suit to quiet title. *Alvey v. Reed, 148*
2. *Same.—Estoppel of Infant.*—An infant can not be estopped from asserting his true age, nor from avoiding his contract by pleading his disability. *Ib.*

MERGER.

See SHERIFF'S SALE, 7.

METROPOLITAN POLICE.

1. *Act of 1883.—Construction.—Criminal Law.—Interfering with Policeman.—City of Indianapolis.—Ordinance.*—By the provisions of section 10 of the metropolitan police act of 1883, the interfering with or interrupting a member of the police force therein provided for, when making an arrest, is made a criminal offence, and a city ordinance of said city covering the same ground is, under section 1640, R. S. 1881, ineffective and void. *City of Indianapolis v. Huegele, 581*
2. *Same.—Constitutional Law.—Section 10, Metropolitan Police Act, Constitutional.—Title of Act.*—Section 10 of the metropolitan police act of 1883 is embraced within the title of the act, and is constitutional. *Ib.*

MISTAKE.

See MORTGAGE, 1 to 3.

MONUMENT COMMISSIONERS.

See SOLDIERS AND SAILORS MONUMENT.

MORTGAGE.

See CHATTEL MORTGAGE; DEED, 2 to 4; EVIDENCE, 4; RAILROAD, 15, 20; SHERIFF'S SALE, 7.

1. *Mistake.—Mutuality.—Reformation.—Complaint.*—Where a complaint seeking the reformation of a mortgage alleges that the mortgagors agreed to convey the whole of a certain tract of land as security for the debt, and that both parties intended that the entire tract should be included in the mortgage, but that by the mistake of the scrivener the description written in the mortgage covered only a part of the tract, a mutual mistake is sufficiently shown. *Keister v. Myers, 312*
2. *Same.—Parties.—Assignment.*—Where a mortgage has been assigned by the mortgagee, the latter is not a necessary or proper party to a suit by the assignee to secure its reformation. *Ib.*
3. *Same.—Estoppel.*—Where a party accepts a mortgage, believing that all the land agreed to be covered by the mortgage is included in the description, the mortgagor is estopped to assert that he intentionally brought about or silently acquiesced in the discrepancy between the instrument and the agreement. *Ib.*
4. *Foreclosure.—Complaint.—Personal Liability of Purchaser from Mortgagor.*—A complaint to foreclose a mortgage, which seeks to fix personal liability for the mortgage debt on a purchaser from the mortgagor, by reason of a contract on his part for such payment, must allege that the mortgaged land has been conveyed to such purchaser. An averment that the defendant purchased the mortgaged premises is not sufficient. *Hammons v. Bigelow, 363*
5. *Parties.—Pleading.*—A suit to foreclose a mortgage can not be maintained against a husband and wife as sole defendants, where the only allegation of title is that "the husband purchased the mortgaged premises." *Ib.*

6. *Parties.—Practice.*—The owner of the land is a necessary party to a suit to foreclose, but when the land has been sold and conveyed the mortgagor is not a necessary, though a proper party. *Ib.*
7. *Foreclosure.—Effect of.—Res Adjudicata.—Estoppel.*—A decree against a mortgagor in a foreclosure proceeding effectually forecloses all the mortgagor's interest in the mortgaged estate adverse to the plaintiff, held by the former at the time the mortgage was executed, without regard to whether a particular interest then held and afterwards asserted be brought in issue or not, and after such decree, and while it remains in force, the mortgagor is estopped from asserting any anterior right or title to such estate. *Gaylord v. City of Lafayette, 423*
8. *Execution of Two Mortgages on Same Day.—Priority.—Fractions of a Day.*—Where two mortgages are fully executed on the same day, but at different hours, the one first executed in point of time is entitled to priority of payment. *Wood v. Lordier, 519*
9. *Pleading.—Mortgage, Foreclosure of.—Promissory Note.—Complaint.—Demurrer.—Location of Mortgaged Premises.*—Where a complaint for foreclosure of a mortgage and for judgment on a promissory note secured thereby states a cause of action upon the note, a copy of which is set out, an objection that the mortgage sued on does not show that the real estate mortgaged is situate in any county in this State can not be reached by a demurrer for want of facts. *Noland v. State, ex rel., 529*
10. *School Fund Mortgage.—Misdescription of Mortgaged Premises.—Reformation of Instrument.—Pleading.—Complaint.*—Where it is shown by the complaint that a mortgage sued on was delivered to the auditor of a county to secure a loan of the common school fund of the State, and the instrument shows on its face that it was signed and acknowledged in that county, by residents thereof, the true and full description of the mortgaged premises, if omitted from the mortgage, may be supplied by the aid of proper averments in the complaint. *Ib.*
11. *Married Woman.—Tenancy by Entireties.—Act of March 25th, 1879.—Debt of Husband.—Pleading.—Answer.—Necessary Averment.*—An answer by a married woman, to a complaint to foreclose a mortgage, executed while the act of March 25th, 1879, was in force, that the mortgaged real estate was held by her and her husband as tenants by entireties, and that the debt secured was the debt of her husband, is insufficient, in the absence of an averment that she acquired her interest therein by gift, descent or devise. *Ib.*
12. *Same.—Separate Property.—Improvement of, and Discharge of Liens Upon.—Lien.*—Where money is borrowed by the wife, or by the husband and wife, or by either of them, for the purpose of discharging valid liens existing on the wife's separate property, or for a purpose which ensures to its benefit or protection, a mortgage properly executed on her separate property may be enforced. *Ib.*

MUNICIPAL CORPORATION.

See COUNTY; INSURANCE, 7; METROPOLITAN POLICE.

1. *Town.—Negligence.—Excavation in Street.—Proximate Cause of Injury.—Intervening Agency.*—Where one, while passing along the street of a town in charge of a prisoner, is seized by the latter, in an attempt to escape, and thrown into a pit negligently permitted by the town authorities to remain in the street, whereby he suffers injury, the town is not liable, its negligence not being the proximate cause of the injury. *Alexander v. Town of New Castle, 51*
2. *Same.—Instruction to Jury.*—An instruction that if the street was in ordinarily safe condition for ordinary public travel, the plaintiff could

not recover, the town not being bound to provide against extraordinary conditions or circumstances, is correct as an abstract proposition, and even if not applicable to the case made, is not harmful to the plaintiff. *Ib.*

NEGLIGENCE.

See DAMAGES, 2; INSTRUCTIONS TO JURY, 5; MASTER AND SERVANT; MUNICIPAL CORPORATION; RAILROAD, 11 to 13, 21; TELEGRAPH COMPANY.

1. *Personal Injury.—Contributory Negligence of Third Person.*—Where a person, himself without fault, is injured by the negligence of a turnpike company, while riding in a private conveyance over which he has no control and which is in charge of the owner, a competent driver, the latter's negligence will not defeat a recovery by such injured person. *Brannen v. Kokomo, etc., Gravel Road Co., 115*
2. *Same.—Special Verdict.—Judgment Upon.*—Where it can not be determined from the facts found by the jury, in a special verdict, whether or not the plaintiff was free from negligence contributing to the injury sued for, he is not entitled to a judgment upon the special finding, unless it be shown that the injury was the result of the wilful wrong of the defendant. *Ib.*
3. *Same.—Turnpike Company.—Coercing Payment of Toll.—Wilful Injury.*—A turnpike company may lawfully close its gates as a means of coercing the payment of toll; and where a gate-keeper, to prevent the passage of travellers who are apparently attempting to drive by without the payment of toll, suddenly lowers the gate-pole, whereby an occupant of the vehicle is injured, the company is not, without more, liable as for a wilful injury. *Ib.*
4. *Railroad.—Highway Crossing.—Wilful Injury.*—A team drawing a loaded wagon was seen by the engineer of an approaching train to be coming on an up-grade toward a public crossing, at a point where trains could be seen for more than nine hundred feet. The engineer sounded the signals required by statute, and also sounded danger signals. The driver of the team, a youth twenty years old, and familiar with the crossing, was lying upon the wagon seemingly asleep or otherwise unconscious. The engineer did not see the driver, but supposed he was walking on the opposite side of the team. Seeing that the team would not be halted, the engineer, when still several hundred feet from the crossing, made every effort to stop the train, but without avail, and the driver was killed.
Held, that the facts do not show a cause of action for either a negligent or a wilful injury. *Indiana, etc., R. W. Co. v. Wheeler, 253*
5. *Malpractice of Surgeon.—Contributory Negligence.*—Contributory negligence is admissible as a defence to an action against a surgeon for malpractice. *Lower v. Franks, 334*
6. *License.—Acquiescence.—Assumption of Risks by Licensee.*—Where a person has a license to go upon the grounds or the enclosure of another, or uses such grounds with the mere acquiescence of the owner, he takes the premises as he finds them, and accepts whatever perils he thereby incurs. *Indiana, etc., R. W. Co. v. Barnhart, 399*
7. *Same.—Liability of Owner of Land for Breach of Duty.—Implied Invitation.*—Where the owner or occupant of lands, by enticement, allurement or inducement, either express or implied, causes another to come upon such lands, he assumes the obligation of providing for the safety and protection of the person so coming, and becomes liable for any breach of duty in that respect which causes injury to such person, in case such enticement, allurement or inducement amounts to an express or implied invitation, and an implied invitation may be inferred

from some act or line of conduct, or from some designation or dedication. *Ib.*

8. *Same.—Statutory Obligation.—Liability for Violation of.—Railroad.—*As a general rule, where an obligation is imposed by a statute, it is negligence *per se* to disregard the obligation thus imposed, and if injury is thereby inflicted, the party disregarding the statute is liable. This rule has peculiar application to the management of railroads and railroad trains. *Ib.*
9. *Same.—Statute Construed.—Railroad Crossings.—Liability of Companies for Failure to Repair.—*Under the provisions of sections 3904 and 3905, R. S. 1881, all railroad companies interested in railroad crossings are required to co-operate in maintaining and keeping such crossings in repair, and are jointly liable for an injury resulting from a neglect to observe such statute. *Ib.*
10. *Railroad.—Carrier of Passengers.—Freight Train.—*It is the duty of a railroad company, engaged in the transportation of passengers, whether by freight or passenger trains, to so run and manage its trains, and to so handle its passengers, that no one shall be injured by its own negligence. *New York, etc., R. W. Co. v. Doane, 435*
11. *Same.—Passenger on Freight Train.—Rights of.—Liability of Railroad Company.—*If a railroad company admits a person into a caboose attached to a freight train, to be transported as a passenger, and takes the customary fare for his transportation as such, it incurs the same liability for his safety as though he had taken passage in one of its regular passenger coaches. *Ib.*
12. *Same.—Stations and Platforms.—Duty of Carrier to Passenger.—*It is the duty of a railroad company to provide suitable stations and platforms to enable passengers to enter its cars and alight therefrom with safety, to stop its trains at the station so that passengers may alight upon the platform, and if passengers are required to alight at any other point, the company is liable for any injuries resulting thereby to such passengers. *Ib.*
13. *Same.—Exceptions as to Freight Trains.—*Where a freight train is accustomed to discharge its passengers at some place other than the platform, or where it is impracticable for it to reach the platform with the caboose or car in which passengers are carried, the passengers may be required to leave the train at some other appropriate and convenient place not connected with the platform; but in such case the passengers are entitled to receive such care and attention as are necessary to enable them to properly reach the station. *Ib.*
14. *Same.—Rights of Passenger.—Liability of Carrier.—*The duty of a railroad company as a common carrier of passengers is not performed until it delivers its passenger in proper condition at the station to which he has paid his fare; and where a passenger on a railroad train is carried past his point of destination, it is the duty of those in charge of the train to either back the same to the station, or to notify the passenger how and where to alight, warn him of any dangers incident to alighting at that point, and give him such assistance or instructions as may be necessary to assure his safe return to the station; and if, without the fault of the passenger, he is injured in making his way back to the station, the company is liable therefor. *Ib.*
15. *Personal Injury.—Compensatory Damages.—*The plaintiff in an action for personal injuries is entitled to full compensatory damages where a disease caused by the injury supervenes and proximately results from the defendant's wrong, as well as where the disease exists at the time of the injury, and is aggravated by it. *Ohio, etc., R. R. Co. v. Hecht, 443*

16. *Same.—Contributory Negligence.—Must Have Contributed to Injury.*—In an action for personal injuries resulting from the negligence of the defendant, the negligence of the plaintiff will not preclude a recovery unless it contributed to his injury. *Ib.*
17. *Same.—Instruction to Jury.—Occupation of Plaintiff.—Damages.*—In such action, an instruction to the jury that they may consider the occupation of the plaintiff, and that they may give him such a sum as will fully compensate him for the injuries he received, is not erroneous. *Ib.*

NEW TRIAL.

See CRIMINAL LAW, 10; JUDGMENT, 4; PRACTICE, 2; QUIETING TITLE.

1. *As of Right.—Motion for.—Practice.—No Issue of Title Contemplated.—Motion to Vacate Order.*—Upon a motion for a new trial as of right, no issue can be formed involving title, nor does the statute contemplate the formation of any such issue upon a motion to vacate an order that has been made granting such new trial. *Brown v. Cody, 484*
2. *Same.—Judgment.—Sale of Real Estate While Action is Pending.*—Where, after judgment affecting the title to real estate, a party to the action is entitled to a new trial as of right under the statute, his adversary can in no way affect that right by making a sale of the land in controversy. *Ib.*

NOTICE.

See COUNTY, 6; DECEDENTS' ESTATES, 3, 4; GRAVEL ROAD, 1, 2; MASTER AND SERVANT, 1 to 4, 6, 8, 10, 11; PARTNERSHIP, 2; PRACTICE, 5; SHERIFF'S SALE, 6; TAXES, 2.

1. *Vendor and Purchaser.*—One who has notice of prior equities, but buys real estate from one who was a purchaser thereof in good faith, will acquire the same title as that of his vendor. *Brown v. Cody, 484*
2. *Assessment.—Notice to Owner.—Legislative Power.*—While the State Constitution sanctions no law under which a lien can be conclusively imposed on property without notice to the owner, affording him an opportunity to be heard in a competent tribunal, yet it is competent for the Legislature to prescribe the kind of notice, and the tribunal before which he may be heard. *Johnson v. Lewis, 490*

NUISANCE.

Private.—Prescriptive Right to Maintain.—A right to maintain a strictly private nuisance upon the land of another may be acquired by prescription, and the time necessary to perfect a prescriptive right in this State is twenty years. *Sherlock v. Louisville, etc., R. W. Co., 22*

OBSTRUCTION OF HIGHWAY.

See HIGHWAY.

OFFICE AND OFFICER.

See BASTARDY, 1, 2; DRAINAGE, 4, 5.

1. *Mandamus.*—Mandamus is not available to settle the title to an office as between adverse claimants; but where a person holds a *prima facie* and uncontested title to the office, or where his title has been adjudicated and finally established by a competent tribunal, a writ of mandate may be issued to put him in possession. *Mannix v. State, ex rel., 245*
2. *Judgment Rendered upon Unlawful Agreement.—Validity of.*—Where a judgment, fair and regular upon its face, has been entered by agreement of the parties adversely claiming an office, such judgment is binding until reversed upon appeal or set aside by a direct proceed-

ing, although the agreement upon which it was entered may have been corrupt and unlawful. *Ib.*

2. *Disqualification of Officer on Account of Interest.*—A county surveyor can not act in a proceeding to repair drains in a case where he and his kindred, within the prohibited degrees, own land to be affected.

Markley v. Rudy, 535

ORDINANCE.

See METROPOLITAN POLICE, 1.

OVERHEAD BRIDGE.

See INSTRUCTIONS TO JURY, 5; MASTER AND SERVANT, 1 to 6.

PARENT AND CHILD.

See REAL ESTATE, 1 to 4.

PARTIES.

See GUARDIAN AND WARD, 2; INSURANCE, 1; MECHANIC'S LIEN, 1; MORTGAGE, 2, 5, 6; QUIETING TITLE, 2; TELEGRAPH COMPANY, 2.

State.—*Capacity to Sue.*—In the absence of any statute to the contrary the State may sue in its own name, without a relator, upon any cause of action it may have, and when it elects to do so it will be governed by the rules applicable to other parties.

State, ex rel., v. Insurance Co., 257

PARTITION.

See REAL ESTATE, 3.

PARTNERSHIP.

1. *Execution.*—*Sale of Firm Property for Individual Debt.*—*Injunction.*—While the interest of a partner in the firm property may be sold upon execution for his individual debt, specific articles of partnership property can not be so sold, and injunction will lie at the suit of the firm. *Williams v. Lewis, 45*

2. *Same.*—*Declarations of Partner.*—*Estoppel of Firm.*—*Notice.*—*Tender.*—The declarations of one partner, in the absence of the other members of the firm, that certain property is the individual property of the partner for whose debt it is taken, are not within the scope of his powers as a partner, and do not estop the firm from suing to set the sale aside and to enjoin the removal of the property, which they may do without tendering the money paid by the purchaser; nor can the acquiescence of one partner in the sale of the firm property for the debt of another partner, bind the members of the firm having no notice. *Ib.*

PAYMENT.

See EXECUTION; STATUTE OF FRAUDS.

PENALTY.

See TELEGRAPH COMPANY.

PERSONAL INJURIES.

See MASTER AND SERVANT; NEGLIGENCE.

PERSONAL PROPERTY.

See CHATTEL MORTGAGE; EXECUTION; REPLEVIN; SALE; WILL, 2.

PHYSICIAN AND PATIENT.

See EVIDENCE, 1, 6; MARRIED WOMAN; NEGLIGENCE, 5.

PLEADING.

See CHATTEL MORTGAGE, 2; COUNTY, 2, 5; CRIMINAL LAW; DECEDENTS' ESTATES, 1, 2; GRAVEL ROAD, 3; INSURANCE, 5; JUDGMENT, 5; MORTGAGE, 1, 4, 5, 9 to 11; PRACTICE; RAILROAD, 4; SLANDER, 1; SUPREME COURT, 4, 6, 7; TAXES, 2.

1. *Motions to Strike Out and to Make Specific.—Supreme Court.—Practice.*—To present any question to the Supreme Court upon the overruling by the trial court of motions to make a pleading more specific or to strike out parts thereof, the motions, rulings and exceptions must be brought into the record by bill of exceptions or order of court.

Board, etc., v. Hill, 316

2. *Same.—Uncertainty.—How Reached.*—A complaint is not vitiated by uncertainty in some of its allegations when it states a cause of action exclusive of such allegations; nor can mere uncertainty therein be taken advantage of by demurrer for want of facts, but the proper remedy is by motion to make specific. *Ib.*

3. *Contract.—Plaintiff's Non-Performance.—Defendant May Plead in Bar.*—While a party who sues for the breach of a contract must allege performance on his part, in order that his complaint may state a cause of action sufficient to withstand a demurrer, yet the defendant may, if he so elects, plead the plaintiff's non-performance in bar of the action. *Ib.*

4. *Reply.*—Where any paragraph of answer contains new matter, the plaintiff may, in separate paragraphs of reply, set up any fact which supports the complaint and avoids the new matter in such paragraph of answer. *Brown v. First Nat'l Bank, 572*

POLICE.

See METROPOLITAN POLICE.

POOR PERSON, ACTION BY.

See GUARDIAN AND WARD, 2.

PRACTICE.

See BASTARDY, 6; BILL OF EXCEPTIONS; CHANGE OF VENUE; CONTINUANCE; CRIMINAL LAW; DECEDENTS' ESTATES, 1, 4; DRAINAGE, 5, 6; FRAUDULENT CONVEYANCE, 3, 4 to 6; HIGHWAY; INSTRUCTIONS TO JURY; INSURANCE, 5; JUDGMENT, 4; NEW TRIAL; PLEADING; SUPREME COURT; VERDICT.

1. *Pleading.—Sustaining Defective Demurrer to Bad Answer.—Harmless Error.*—It is at most a harmless error to sustain a defective demurrer to a bad answer. *Board, etc., v. Gruver, 224*

2. *Continuance.—Change of Venue.—Causes for New Trial.*—The erroneous refusal to grant a continuance or to remand the cause to the court from which an irregular change of venue has been taken, are causes for a new trial, and are only available when assigned as such; but where final judgment has been entered on the pleadings, without a trial, such errors are immaterial. *Mannix v. State, ex rel., 245*

3. *Appearance.—Waiver.*—A party who appears in the court to which the venue of a cause has been changed and moves for a continuance, thereby waives his right to thereafter move that the cause be remanded on account of irregularities in taking the change. *Ib.*

4. *Pleading.—Demurrer.—Abandonment of.*—A demurrer to a complaint will be deemed to be abandoned, where the defendant files an answer without first requiring a decision on the demurrer, and such party will be precluded from thereafter making any question upon it.

Moore v. Glover, 367

5. *Special Appearance.—What Steps May be Taken Under.—Jurisdiction.—Defects in Notice.—Waiver.*—A special appearance may be entered for the purpose of taking advantage of any defects in a summons or notice, or to question the jurisdiction of the court over the person; but filing a demurrer or motion which pertains to the merits of the case, constitutes a full appearance and submission to the jurisdiction, and waives any defect in the notice or summons. *Gilbert v. Hall, 549*
6. *Filing Papers.—Motions Must be Presented to Court.*—Where proceedings or motions are required to be taken or made in a cause during its progress in term time, such motions and proceedings must be presented to the court, and its attention called thereto, and not merely filed in the clerk's office. *Ib.*
7. *Special Finding of Facts.—Conclusions of Law.—Exception to Conclusion of Law Admits Correctness of Finding.*—An exception to a conclusion of law, based on a special finding of facts, admits that the facts have been fully and correctly found by the trial court. *Neisler v. Harris, 560*

PREFERENCE OF CREDITOR.

See DEBTOR AND CREDITOR.

PRESCRIPTIVE RIGHT.

See NUISANCE; RAILROAD, 7, 12.

PRESUMPTION.

See BASTARDY, 4; COUNTY COMMISSIONERS, 2; DEED, 2; FRAUDULENT CONVEYANCE, 5, 7, 8; INSTRUCTIONS TO JURY, 1; JURISDICTION; SHERIFF'S SALE, 5; TRIAL, 3.

PRINCIPAL AND SURETY.

See FRAUDULENT CONVEYANCE, 1; GUARDIAN AND WARD; SHERIFF'S SALE, 1 to 6.

Payment by Surety.—Indemnity.—Promissory Note.—Attorney's Fees.—Decedent's Estate.—Where a surety, in paying a promissory note executed by himself and his deceased principal, is not required to pay the attorney's fees for which the note provides, he is not entitled to recover such attorney's fees from his principal's estate, but he is entitled to recover the amount paid by him, with interest, and no more, his cause of action being not upon the note, but upon an implied promise of indemnity. *Giesecke v. Johnson, 308*

PRIORITY OF LIEN.

See MORTGAGE, 8; SHERIFF'S SALE, 3.

PROMISSORY NOTE.

See EXEMPTION FROM EXECUTION; INSURANCE, 8; MORTGAGE, 9; PRINCIPAL AND SURETY; SET-OFF, 1; WILL, 2.

1. *Assignment.—Agreement of Assignee to Pay for Note if He Uses it.*—Where one takes the assignment of a promissory note, agreeing to pay a certain sum therefor if he can use it, the subsequent use of the note as a cause of action renders him liable for the stipulated consideration, although it may not appear that he received any money upon it. *Mitchell v. Hartlep, 374*
2. *Not Negotiable.—Contract of Forbearance.—New Contract.*—Where the maker of a promissory note, not governed by the law merchant, agrees with the assignee thereof, to whom the note was assigned before maturity, that if the latter will extend the time of payment for a definite time he will pay the same at the expiration of said period, and the time is so extended, such promise of the maker constitutes a

new contract, binding in law, and capable of enforcement, though the maker had a good defence to the note before its assignment.

Brown v. First Nat'l Bank, 572

3. *Same.—Blank in Instrument.—Power of Payee or Endorsee to Fill.*—Where, in a promissory note, there is a blank space immediately preceding the words "promise to pay," apparently intended to be filled with the pronoun "I" or "we," the payee, or any endorsee, may fill such space with the proper pronoun, without impairing the validity of such note. *Ib.*

PUBLIC AID TO RAILROAD COMPANY.

See RAILROAD, 15 to 20.

PUBLIC BRIDGES.

See COUNTY, 5, 6.

PUBLIC BUILDINGS.

See COUNTY, 3, 4.

PUBLICATION OF LAWS.

See STATUTE.

QUIETING TITLE.

See JUDGMENT, 3; MECHANIC'S LIEN.

1. *Sheriff's Sale.—Ownership of Execution Defendant Not Terminated Thereby.—Consummation of Sale.—Lien of Purchaser.*—Where lands are sold at sheriff's sale the rights of the execution defendant as owner of such lands do not terminate until the sale is consummated by the execution of a sheriff's deed. He continues the owner until that time, as against the purchaser, subject to the lien of the latter, and may maintain an action to quiet title. *Brown v. Cody, 484*
2. *Judgment.—Sheriff's Sale.—New Trial as of Right.—Substitution of Party Plaintiff.*—Where, pending an action to quiet title, the land in controversy is sold at sheriff's sale as the property of the plaintiff, he may, notwithstanding, proceed with his action, and if judgment is rendered before a sheriff's deed is executed, he may have a new trial as of right under the statute; and after the granting of such new trial and the execution of a sheriff's deed, the owner under such deed may, by proper application, be substituted as plaintiff, and prosecute the original action to final judgment. *Ib.*

RAILROAD.

See DAMAGES; HIGHWAY; MASTER AND SERVANT, 1 to 10; NEGLIGENCE, 4, 6 to 17; STATUTE.

1. *Act of 1852.—Grant of Right of Way in Advance of Organization.—Ratification.*—Under section 13 of the railroad law of 1852 (1 G. & H. 508), construed in connection with other powers of a railroad company, it was competent for a land-owner to grant a right of way over his land to a railroad company in advance and in aid of its organization, and for the company, after its organization, to ratify and accept the grant by entering upon and using the land for the purposes of its road, and thus make such grant obligatory. *Bravard v. Cincinnati, etc., R. R. Co., 1*
2. *Same.—Failure to Complete Road Within Time Limited.—Forfeiture of Franchise.—Ejectment.*—The failure of a railroad company to construct its road within the time limited by statute may afford cause for enforcing, by proper proceedings, a forfeiture of its corporate powers, but it is not available to a land owner in an action to eject the company from his land after the road has been constructed thereon. *Ib.*

3. *Same.—Trespassing Railroad.—Estoppel.—Ejectment.—Injunction.—Assessment of Damages.*—A trespassing railroad company may be ejected from land, or enjoined from appropriating or using it, if the owner shall proceed with reasonable promptitude; but if he acquiesces until the road has been constructed across his land and has become a part of the railroad line, in which the public has acquired an interest, his only remedy is through a proceeding for the assessment of damages. *Ib.*
4. *Ejectment.—Statute of Limitations.—Adverse Possession.—Pleading.*—A complaint in ejectment, against a railroad company incorporated under the laws of this State, which shows that the plaintiff has been the owner of the land sought to be recovered for more than twenty-five years, during all of which time the defendant has held adverse possession, is bad on demurrer as showing a cause barred by the twenty years statute of limitations, and not within any of the exceptions to the statute. *Sherlock v. Louisville, etc., R. W. Co., 22*
5. *Same.—Trespass.—Adverse Possession Beginning With.*—The fact that the railroad company took possession of the land as a trespasser did not prevent the running of the statute of limitations, and open and adverse use for twenty years was sufficient to establish a right of way. *Ib.*
6. *Same.—Damages.—When Action to Recover Barred.*—Title acquired by an adverse occupancy for twenty years will defeat any claim that the original owner may have had for damages resulting from such occupancy. *Cox v. Louisville, etc., R. R. Co., 48 Ind. 178, distinguished. Ib.*
7. *Same.—Private Nuisance.—Prescriptive Right to Maintain.*—A right to maintain a strictly private nuisance upon the land of another may be acquired by prescription, and the time necessary to perfect a prescriptive right in this State is twenty years. *Ib.*
8. *Same.—Ejectment.—Injunction.—Estoppel.*—A land-owner who has stood by for thirty years, and, without objection, allowed a railroad company to expend its money in the construction and repair of its road upon his land, is estopped to maintain either ejectment or injunction. *Ib.*
9. *Same.—Damages.—Successive Actions.*—Where land is taken by a railroad company, all damages therefor, and all that naturally and proximately result from the proper construction and operation of the road, must be recovered in one action, as successive actions can not be maintained. *Ib.*
10. *Same.—Subsequent Purchaser.—Right of Action.*—Such damages accrue to the person owning the land at the time of the construction of the road; they do not pass to a subsequent purchaser, except by a special stipulation, and to entitle him to maintain an action therefor he must procure an assignment of the claim. *Ib.*
11. *Same.—Defective Bridge.—Overflows Caused by.—Accruing of Cause of Action.*—A subsequent grantee of land may maintain an action for damages resulting, during a freshet, from overflowing backwater caused by the negligent construction of a railroad bridge, prior to his purchase, over a natural watercourse flowing through his land, the cause of action for such damages accruing at the time of the overflow, and not at the time the bridge was constructed. *Ib.*
12. *Same.—Prescriptive Right to Overflow Adjoining Lands.*—To constitute a prescriptive right in favor of a railroad company to overflow the lands of another, by maintaining an insufficient and negligently constructed bridge upon its right of way, it is not enough to show that the bridge has been maintained in the same manner for twenty years, but it must be shown that there has been a lapse of twenty

- years since such an invasion of the adjoining proprietor's rights as resulted in the accruing to him of a cause of action therefor. *Ib.*
13. *Same.—Acquiescence.—Estoppel.*—The facts that the plaintiff and his predecessors in the title to the land had knowledge of the erection of the bridge and the manner of its construction, and made no objections, do not, in the absence of an averment that the plaintiff knew that the bridge would flood his land and that he acquiesced therein, create an estoppel against him. *Ib.*
14. *Same.—Right to Remove Fences Encroaching Upon Right of Way.*—A railroad company has the right to remove, without liability for damages, fences constructed upon its right of way, lawfully acquired, by an adjoining land-owner. *Ib.*
15. *Township Aid.—Taking Stock.—Mandate to Compel Collection of Special Tax.—Mortgage.—Foreclosure and Sale.*—Under the act of 1869 (Acts 1869, Spec. Sess., p. 92) a township, upon a proper petition, voted to aid a named railroad company in constructing a railroad by taking the stock of such company to a certain amount. A special tax was levied in 1872 for one-half of the amount appropriated, and the money thus raised was paid to the company, it having done work to that amount in the township. The next year a levy was made to raise the balance of the appropriation, but it has never been placed upon the tax duplicate for collection. In 1875, and before the completion of the road, the company mortgaged all its property and franchises, became insolvent, and ceased work upon the road. At a sale under a foreclosure of the mortgage, all the property and franchises covered by the mortgage were conveyed to a new and independent corporation, sustaining no relation to the old company. The new company has completed the road through the township. It has neither issued nor offered to issue any capital stock to the township, but seeks by mandate to compel the collection of the second half of the taxes levied in behalf of the old company.
- Held*, that no right to the appropriation passed to the new company by the mortgage and foreclosure proceedings, and it is not entitled to the money voted to the old company, and can not enforce the collection of the taxes, as it can neither demand the appropriation as a donation nor in return for stock other than that of the company to aid which the appropriation was made. *Board, etc., v. State, ex rel., 64*
16. *Same.—Aid by Way of Donations and Taking Stock.—Statutory Distinction.*—The statutes of this State create a distinction between appropriations by townships, by way of donations to railroad companies, and by way of taking stock therein; and the people to be taxed have a right to determine in advance, and to impose a condition, that the amount appropriated shall be by way of taking stock; when this has been done, the money can not be demanded by the railroad company as a donation. *Ib.*
17. *Same.—Appropriation a Contract.*—An appropriation by a township by way of taking stock in a railroad company, when within the authority given by the statutes and when the subscription is made, will be considered as a contract, just as a subscription for stock in such company by an individual is a contract, and the township is entitled to the same protection as a private subscriber. *Ib.*
18. *Same.—Subscription to Stock.—How Made.*—Under the act of 1869, concerning aid to railroads, the simple voting of aid by a township is not a subscription to the stock of the railroad company, but the subscription is to be made by the board of county commissioners, which, for that purpose, acts as the agent of the township, and until the board exercises such power there is no perfected or enforceable subscription. *Ib.*

19. *Same.—When Appropriation Becomes a Chose in Action.*—Until the railroad company to which aid has been voted occupies a position which will enable it to enforce whatever right or interest it may have in the appropriation, such appropriation is not a chose in action in its favor which it can assign or mortgage. *Ib.*
20. *Same.—Sale of Railroad Under Foreclosure.—Release of Subscribers to Stock.*—Under the act of 1865 (Acts 1865, Reg. Sess., p. 66; R. S. 1881, section 3947, *et seq.*), relating to the sale of railroads and the formation of new corporations, all subscriptions to the stock of a railroad company whose property has been sold under foreclosure proceedings are discharged, unless there has been a previous adjustment, and such act of 1865 is applicable to subscribers who have become such under subsequent statutes. *Ib.*
21. *Deed to Right of Way.—Subsequent Encroachment Upon Adjoining Land of Grantor.—Construction and Repair of Road-Bed.—Damages.—Negligence.*—A railroad company which has received a deed and paid the consideration for land upon which to construct and operate its road, is liable to the grantor for injuries subsequently caused to his land adjoining the right of way by the construction and repair of its road-bed in such a manner as to encroach thereon, without regard to any question of negligence on its part or knowledge that its works would cause the injury. *Roushlang v. Chicago, etc., R. W. Co., 106*

RAPE.

See CRIMINAL LAW, 4, 5.

REAL ESTATE.

- See DAMAGES; DECEDENTS' ESTATES, 1, 2; DEED; FRAUDULENT CONVEYANCE; JUDGMENT, 1, 3, 6; LANDLORD AND TENANT; MORTGAGE; NEW TRIAL; NUISANCE; QUIETING TITLE; RAILROAD, 1 to 14, 21; TRUST AND TRUSTEE; WILL, 1.
1. *Oral Contract to Convey.—Specific Performance.—Statute of Frauds.*—Where a father orally agrees to convey certain land to his son for services rendered after attaining his majority, and the latter in reliance upon the agreement enters into possession, and so continues uninterruptedly for more than twenty years, making lasting and valuable improvements, and treating the land as his own, while the father repeatedly declares that the land belongs to his son, the contract is withdrawn from the operation of the statute of frauds, and the son is entitled, upon the death of the father without making a deed, to a specific performance. *Cutsinger v. Ballard, 93*
 2. *Same.—Trust.*—The son having fully performed his part of the contract and thereby paid the purchase-price for the land, his father thereafter held the title in trust for him, and, there being no open disavowal by the trustee, or insistence upon an adverse right, fully made known to the *cestui que trust*, no lapse of time is a bar to an action for specific performance. *Ib.*
 3. *Same.—Demand.—Repudiation of Contract.—Partition.*—A suit by other heirs for partition of the land occupied by the son under the agreement with his father, constituted such a repudiation of the contract as to render unnecessary a demand by him before filing a cross-complaint asking a decree for performance. *Ib.*
 4. *Same.—Proof of Contract.*—In a case for specific performance of an oral contract to convey land, while the proof must clearly establish the contract, it is yet a question for the court to determine whether the proof offered is sufficient for that purpose. *Ib.*
 5. *Possession Under Contract to Devise.—Repudiation of Contract.—Liability for Improvements.*—A will can not speak until the testator's death,

and hence one who has gone into possession of land under an agreement whereby he is to become the owner thereof by devise, can not, prior to the testator's death, on information that the will as executed does not conform to the agreement, repudiate the contract and maintain an action on account for improvements made. *Hopkins v. Ratliff*, 213

6. *Possession Under Contract of Purchase.*—*Mechanic's Lien.*—*Estoppel.*—Where one who is in possession of real property under a contract of purchase procures improvements to be made thereon, with the mere knowledge and consent of the vendor, the latter is not thereby estopped to assert his prior and recorded title as against one claiming title through the foreclosure of a mechanic's lien attempted to be asserted by the person making the improvements.

People's Savings, etc., Ass'n v. Spears, 297

REAL ESTATE, ACTION TO RECOVER.

See JUDGMENT, 3; RAILROAD, 2 to 8.

RECEIVER.

See CORPORATION, 3; CRIMINAL LAW, 7.

RECORDING WRITTEN INSTRUMENT.

See CHATTEL MORTGAGE, 2; EVIDENCE, 4.

REDEMPTION FROM JUDICIAL SALE.

See SHERIFF'S SALE, 7.

REFORMATION OF MORTGAGE.

See MORTGAGE, 1 to 3, 10.

RENTS.

See APPEAL BOND; WILL, 1.

REPAIR OF DRAINS.*

See DRAINAGE, 3 to 5.

REPLEVIN.

1. *When Maintainable for Goods Fraudulently Obtained.*—*Disaffirmance of Contract.*—*Vendor Must Restore Purchase-Price Received.*—While the commencement of an action to reclaim property, the possession of which has been obtained by fraud, is ordinarily a sufficient disaffirmance of the contract, where the vendor has received nothing of value, yet in case money has been paid, or the purchaser's notes have been received, replevin can not be maintained for the recovery of the property, while the vendor retains the money or notes for the purchase-price. *Thompson v. Peck*, 512
2. *Same.*—*Strictly Law Action.*—*Bringing Notes Into Court.*—Replevin is strictly an action at law, in which the right of recovery must exist at the time the action is commenced. It can not be created by bringing notes into court as in an equitable suit for rescission, and offering to surrender them as the court may direct. *Ib.*

RES ADJUDICATA.

See MORTGAGE, 7.

RETALIATORY LAWS.

See INSURANCE, 1 to 7.

REVIVOR OF DEBT.

See EXEMPTION FROM EXECUTION.

RIGHT OF WAY.

See DAMAGES; RAILROAD.

RULES OF COURT.

See CHANGE OF VENUE.

SALE.

See CHATTEL MORTGAGE; DECEDENTS' ESTATES, 1, 2; EXECUTION; INTOXICATING LIQUOR; NEW TRIAL, 2; PARTNERSHIP; QUIETING TITLE; RAILROAD, 15, 20; STATUTE OF FRAUDS; TELEGRAPH COMPANY, 4.

1. *Subsequent Agreement to Rescind.—Statute of Frauds.*—Where an unconditional sale of personal property of more than fifty dollars in value has been entirely consummated, an oral contract for its rescission stands upon the footing of a new and independent contract, is within the statute of frauds, and not binding; but where the sale is upon a condition, and some material thing remains to be done before the transaction is complete, an oral agreement for rescission is merely incidental to the original contract, and is binding.

Wulschner v. Wurd, 219

2. *Same.*—Where a piano is sold upon the condition that the purchaser shall have time within which to test it, and that, if it is not as warranted, another will be furnished in its place, a subsequent oral agreement to surrender to the purchaser notes given by him for the purchase-price, if he will return the property, is binding, and entitles the latter to a rescission of the sale, if he promptly complies with the agreement on his part.

Ib.

3. *Fraud.—Sale of Personal Property.—Voidable Contract.—Rescission.—Remedy of Vendor.*—Although a sale of property is induced by fraud, the contract is not void but voidable upon the election of the vendor. He may elect to rescind the contract, by returning or offering to return whatever of value he may have received and reclaim his property, or he may retain the consideration and treat the bargain as subsisting.

Thompson v. Peck, 512

4. *Replevin.—When Maintainable for Goods Fraudulently Obtained.—Disaffirmance of Contract.—Vendor Must Restore Purchase-Price Received.*—While the commencement of an action to reclaim property, the possession of which has been obtained by fraud, is ordinarily a sufficient disaffirmance of the contract, where the vendor has received nothing of value, yet in case money has been paid, or the purchaser's notes have been received, replevin can not be maintained for the recovery of the property, while the vendor retains the money or notes for the purchase-price.

Ib.

5. *Same.—Strictly Law Action.—Bringing Notes Into Court.*—Replevin is strictly an action at law, in which the right of recovery must exist at the time the action is commenced. It can not be created by bringing notes into court as in an equitable suit for rescission, and offering to surrender them as the court may direct.

Ib.

6. *Fraud.—Fraudulent Conduct.—What Sufficient to AVOID Sale.*—To avoid a sale on the ground of fraud, after the goods have come fully into the possession of the buyer, apparently in the ordinary course of his business, it is not sufficient to show that the purchaser was insolvent when the goods or any of them were purchased, and that he knew his debts exceeded his assets. There must have been some artifice or trick, false pretence or fraudulent suppression of the truth, which enabled the purchaser to obtain possession, and it must also appear that he intended at the time not to pay for the goods.

Ib.

SCHOOL FUND MORTGAGE.

See MORTGAGE, 10.

SET-OFF.

1. *Promissory Note.—Endorsee.—Nominal Holder.—Consideration.*—A claim, arising out of an independent transaction, and for which a merely nominal consideration has been paid, is not available as a set-off against a promissory note in the hands of an endorsee in good faith and for value, or even in the hands of a mere equitable assignee.
Proctor v. Cole, 15
2. *Of Judgments.—Exemption from Execution.*—In an action to set off judgments founded upon contract and obtained by the plaintiff and defendant against each other, the defendant, being a resident householder, and claiming his judgment as exempt, under section 703, R. S. 1881, may defeat the set-off by a showing that all of his property, including the judgment, is of less value than six hundred dollars; but a showing merely that the defendant is insolvent, and has no property subject to execution, is not sufficient to authorize the exemption.
Carpenter v. Cool, 134
3. *Contract.—Tort.—Waiver.*—A claim arising out of tort can not be pleaded by way of set-off against a cause of action founded upon or arising out of contract; nor can the defendant, by waiving his right of action for the tort, make such claim available as a set-off. Section 348, R. S. 1881.
Richey v. Bly, 232
4. *Judgments.—Decedent's Estate.—Insolvency.—Tort.*—A. and B. effected an exchange of lands. Subsequently B.'s administrator, in an action originally commenced by B., obtained a judgment against A. for deceit as to the value of the land received in the transaction. Afterwards A. recovered a judgment against the estate of B. for money which he had been compelled to pay by reason of a breach of the warranty against encumbrances contained in the deed to him.
Held, that A. is entitled to have his judgment set off against the judgment in favor of the estate, although the estate is insolvent.
Held, also, that the judgment against A. was not for a tort, within the proper meaning of that term, but that even if it were, the circumstances make a case for an equitable set-off. *Quick v. Durham, 302*

SHERIFF'S SALE.

See QUIETING TITLE.

1. *Principal and Surety.*—A sale of property belonging to a surety before the property of the principal has been exhausted, as required by the judgment, is not available to defeat the sale at the suit of a third person.
Hollcraft v. Douglass, 139
2. *When Will not be Set Aside, Even if Void.*—A sheriff's sale, whether void or voidable, under which third persons have acquired rights, will not be set aside at the suit of a judgment creditor where the latter may, by an ordinary execution, reach other property of his debtor in satisfaction of his judgment. *Ib.*
3. *Priority of Judgment Liens.*—Judgments rendered against a debtor by the same court upon the same day have no priority over each other, but the person who first obtains an execution and levy secures a lien superior to that of the other judgment creditors. *Ib.*
4. *Irregularities.—Not Available to Judgment Creditor.*—A sheriff's sale will not be set aside, on account of irregularities, in an action by a judgment creditor. *Ib.*
5. *Description.—Levy.—Presumption.*—Where real estate has been sold and conveyed by a sheriff by a correct description, it will be presumed; in a suit by a judgment creditor to set the sale aside, the contrary not being shown, that the property was correctly described in the levy. *Ib.*
6. *Notice of Irregularities.—Innocent Purchaser.—Judgment Surety.*—A surety

in a judgment, who purchases the property of his principal at a sheriff's sale made upon the judgment, is not bound to take notice of irregularities in the sheriff's proceedings, and, in the absence of actual notice thereof, he is entitled to protection as a third party and innocent purchaser. *Ib.*

7. *Junior Liens.—Redemption.—Deed.—Merger.*—In a suit to foreclose a mortgage the holders of junior judgment liens were made parties defendants. At a valid sale under the decree of foreclosure, S. purchased the mortgaged property and received a certificate of sale. Before the year for redemption expired, S. also purchased from the mortgagors their equity of redemption, received a quitclaim deed from them, and went into possession. The junior lien-holders seek to enforce their liens without redeeming from the sheriff's sale.

Held, that the only right of the junior lien-holders was to redeem within the time allowed for that purpose.

Held, also, that the title acquired by S. through the sheriff's deed related back to the date of the sale and vested in him as of that date, and hence was not merged in the title acquired under his quitclaim deed from the mortgagors. *Duesterberg v. Swartzel, 180*

SHORT-HAND REPORTER.

See BILL OF EXCEPTIONS, 3.

SLANDER.

1. *Charge of Fornication or Adultery.*—It is actionable slander to charge a woman with fornication or adultery; and where the complaint avers that the defendant stated that the plaintiff, an unmarried woman, was guilty of an act of sexual intercourse, it is good after verdict. *Binford v. Young, 174*
2. *Financial Condition of Defendant.—Evidence.*—Evidence as to the wealth of a deceased relative of the defendant, whose heir the latter was, is competent as tending to prove the financial condition of the defendant. *Ib.*
3. *Understanding of Hearers.*—In an action for slander, a witness may state what he understood the defendant to mean by the words he used. *Ib.*
4. *Reputation for Chastity.—Admissible Hearsay Evidence.*—Where, in an action for slander, a witness states that the reputation of the plaintiff for chastity is bad, he may be required, on cross-examination, to state what he had heard that the defendant had said to others on that subject; but the defendant may then testify as to whom he spoke the slanderous words. *Ib.*
5. *Exemplary Damages.—Malice.—Repetition of Slanderous Words.*—As exemplary damages may be awarded in actions for slander, the defendant may show, for the purpose of preventing an inference of express malice, that he did not repeat the words uttered by him to others than named persons. *Ib.*

SOLDIERS AND SAILORS MONUMENT.

1. *Statute Construed.—Appropriation.*—Under the provisions of the act of March 3d, 1887 (Acts 1887, p. 30), the whole amount of money therein appropriated, must, as far as it may be used at all, be devoted to the structural work of the soldiers and sailors monument, therein provided for, and not to the incidental expenses connected therewith which do not enter into the cost value of the edifice. *Campbell v. Board, etc., 591*
2. *Same.—Incidental Expenses of Board.—Payable Out of General Fund.—Auditor of State.*—The auditor of state has authority to draw his warrant on the treasurer of state for the merely incidental expenses in-

curred from time to time in the erection of the soldiers and sailors monument, under the act of March 3d, 1887, to be paid out of the general fund, when there is sufficient money in that fund to pay the amount of such warrant. *Ib.*

SPECIAL FINDING.

See NEGLIGENCE, 2; PRACTICE, 7; SUPREME COURT, 8; VERDICT.

SPECIAL VERDICT.

See NEGLIGENCE, 2; VERDICT.

SPECIFIC PERFORMANCE.

See REAL ESTATE, 1 to 4.

STATE, RIGHT TO SUE.

See PARTIES.

STATUTE.

See BASTARDY, 1, 3, 5; BILL OF EXCEPTIONS, 1; COUNTY, 1; CRIMINAL LAW, 5, 8; DRAINAGE; EVIDENCE, 1; GUARDIAN AND WARD, 1, 2; HIGHWAY; INSTRUCTIONS TO JURY, 2, 3; INSURANCE, 3, 6, 7; INTOXICATING LIQUOR, 3 to 5; JUDGMENT, 5; MARRIED WOMAN; METROPOLITAN POLICE; MORTGAGE, 11; NEGLIGENCE, 9; RAILROAD, 1, 15, 16, 18, 20; SET-OFF, 3; STATUTE CONSTRUED; SUMMONS; TELEGRAPH COMPANY, 1 to 3.

Publication and Distribution of Statutes "by Authority."—*Railroad Law of 1852.*—The publication and circulation by the secretary of state of the railroad law of 1852, under a resolution passed by the General Assembly, in advance of the publication of the revised statutes of that year, constituted a publication and circulation of such law "by authority," within the meaning of the Constitution.

Bravard v. Cincinnati, etc., R. R. Co., 1

STATUTE CONSTRUED.

See COUNTY, 1, 2; DRAINAGE, 2, 4, 5; HIGHWAY; INSURANCE, 3, 6, 7; INTOXICATING LIQUOR, 3 to 5; JUDGMENT, 5; MARRIED WOMAN; METROPOLITAN POLICE; MORTGAGE, 11; NEGLIGENCE, 9; RAILROAD, 1, 15, 18, 20; SOLDIERS AND SAILORS MONUMENT; TELEGRAPH COMPANY, 1 to 3.

Rules of Construction.—For rules in the construction of statutes, see opinion. *City of Indianapolis v. Huegele, 581*

STATUTE OF FRAUDS.

See REAL ESTATE, 1; SALE, 1, 2.

1. *Part Payment.—Earnest Money.*—Part payment of the contract-price of property bargained for is earnest money, and will prevent the operation of the statute of frauds. *Weir v. Hudnut, 525*
2. *Same.—Payment May be Made According to Contract of Parties.*—Such part payment may be made not only in money, but in property or services, or whatever of value the parties agree shall constitute payment. *Ib.*

STATUTE OF LIMITATIONS.

See RAILROAD, 4 to 6, 12; WILL, 1.

STAY OF EXECUTION.

See APPEAL BOND.

STOCK AND STOCKHOLDER.

See CORPORATION, 1, 2; RAILROAD, 15 to 20.

STREETS AND ALLEYS.

See MUNICIPAL CORPORATION.

SUBSCRIPTION TO CORPORATE STOCK.

See RAILROAD, 15 to 20.

SUBSTITUTION OF PARTIES.

See QUIETING TITLE, 2.

SUMMONS.

See PRACTICE, 5.

Precipe for.—Endorsement on Complaint.—Statute.—An endorsement on a complaint, "Clerk will docket this cause for trial January 10th, 1887, and issue summons returnable that date," signed by the plaintiff's attorneys, is in substantial compliance with the provisions of section 516, R. S. 1881, and authorizes the issuance of a summons and fixes the day at which it shall be made returnable. *Moore v. Glover, 367*

SUPERSEDEAS.

See APPEAL BOND.

SUPREME COURT.

See APPEAL BOND; BILL OF EXCEPTIONS; CONTINUANCE, 2; CRIMINAL LAW, 3, 9 to 12, 14, 15; INSTRUCTIONS TO JURY; INTOXICATING LIQUOR, 1, 2; JUDGMENT, 6; PLEADING, 1; VERDICT, 1.

1. *Instruction to Jury.—Reversal of Judgment.*—Where the merits of a cause have been fully and fairly tried, and a right conclusion has been reached, an erroneous instruction will not authorize the reversal of the judgment. *State, ex rel., v. Caldwell, 6*
2. *Evidence.—Exclusion When Improperly Offered on Cross-Examination.—Error—Practice.*—No available error can be predicated upon the exclusion of evidence improperly offered on cross-examination. *Britton v. State, ex rel., 55*
3. *Change of Venue.—Bill of Exceptions.*—No question is presented upon a ruling denying a change of venue if the application therefor is not made a part of the record by a bill of exceptions. *Johnson v. Johnson, 112*
4. *Pleading.—Practice.—Assignment of Error.*—A defendant can not assign available error upon the sustaining of a demurrer filed by another defendant to the plaintiff's complaint. *Duestenberg v. Swartzel, 180*
5. *Transcript.—Motion to Eliminate Parts of Record.—Affidavits.—Practice.*—A motion to eliminate parts of the record, alleged to have been interpolated without authority after the appeal, will be overruled, because the transcript, when properly certified, imports absolute verity, and because the Supreme Court will not undertake to reconcile the affidavits for and against the motion, or pass upon their preponderance. *Justice v. Justice, 201*
6. *Practice.—Pleading.*—When the sufficiency of a complaint is first attacked in the Supreme Court, the question of its sufficiency has relation only to the time at which judgment was rendered upon it, and to the form in which it is found in the record. *Moore v. Glover, 367*
7. *Practice.—Complaint Considered as a Whole When Objected to First in Supreme Court.*—Where the sufficiency of a complaint, or any paragraph thereof, is challenged for the first time in the Supreme Court by assignment of error, the complaint will be considered as a whole, and the objection will not avail if there is one good paragraph. *Branch v. Faust, 464*

2. *Special Finding of Facts and Conclusions of Law.—Omission of Signature of Judge.—Bill of Exceptions.*—Where a purported special finding of facts and conclusions of law have been copied into the transcript, without the signature of the judge, they will not be considered part of the record unless brought into it by a bill of exceptions; and where there is no bill of exceptions, such finding will be regarded as a general finding. *Ib.*
9. *Practice.—Judgment not Reversed on Weight of Evidence.*—A judgment will not be reversed on the weight of the evidence if there is evidence fairly tending to support it. *Brigham v. Hubbard, 474*

SURETY.

See FRAUDULENT CONVEYANCE, 1; GUARDIAN AND WARD; PRINCIPAL AND SURETY; SHERIFF'S SALE, 1 to 6.

TAXES.

See INSURANCE, 1 to 4, 6, 7; RAILROAD, 15.

1. *Injunction.—Equitable Jurisdiction.*—A court of equity will not enjoin the collection of taxes, claimed to be illegal, until the plaintiff has first paid or tendered the amount of taxes assessed against him, the legality and validity of which he does not call in question in his complaint. *Board, etc., v. Dailey, 360*
2. *Free Gravel Road Tax.—Notice.—Pleading.—Complaint.*—In an action to enjoin the collection of a special free gravel road tax, an averment in the complaint that such tax was attempted to be levied on the plaintiff "without notice to him," is not equivalent to an averment that the same was attempted to be levied "without any notice whatever," and is insufficient to charge want of notice. *Ib.*

TAX LIST.

See FRAUDULENT CONVEYANCE, 4.

TELEGRAPH COMPANY.

1. *Negligence.—Statutory Penalty.—Special Damages.*—Section 4176, R. S. 1881, relating to telegraph companies, having been repealed by the act of 1885 (Acts of 1885, p. 151), the fixed penalty prescribed therein for a merely negligent breach of duty in the transmission of messages is no longer recoverable; but such companies are still liable under section 4177, and also upon common law principles, for special damages. *Hudley v. Western U. Tel. Co., 191*
2. *Same.—Who May Maintain Action.*—It is only the sender of a dispatch who occupies that privity of contract with or relation to the telegraph company which is necessary to the maintenance of a suit for the statutory penalty, and this rule is not changed by the phrase "any party aggrieved," as used in the act of 1885; but as to special damages a different rule prevails, and an action may be maintained therefor by the person to whom the message is sent. *Ib.*
3. *Construction of Statute.*—In the construction of a statute authorizing the recovery of a penalty, a strict interpretation ought to be given to its provisions, and, in such a case, as in others where the meaning is obscure, a resort may be had to previous legislation on the same subject. *Ib.*
4. *Sale of Cattle.—Failure to Deliver Message.—Recovery for Loss of Weight.*—Where one has sold cattle for future delivery, at the option of the purchaser, and the latter sends a dispatch notifying him that he will take the cattle in the morning of the next day, in pursuance of a custom among stock dealers to take and weigh cattle at early daylight, which dispatch the telegraph company fails to deliver promptly, whereby the weighing of the cattle is delayed and their weight de-

creased, the seller may recover for the loss of weight so resulting from the company's negligence. *Ib.*

TENANT.

See LANDLORD AND TENANT.

TENANTS BY ENTIRETIES.

See MORTGAGE, 11, 12.

TENDER.

See PARTNERSHIP, 2; TAXES.

TIME.

See MORTGAGE, 8.

TITLE.

See NEW TRIAL; NOTICE, 1; OFFICE AND OFFICER, 1, 2; QUIETING TITLE; RAILROAD, 6.

TOLL-GATE.

See NEGLIGENCE, 3.

TORT.

See SET-OFF, 3, 4.

TOWN.

See MUNICIPAL CORPORATION.

TOWNSHIP.

See RAILROAD, 15 to 20.

TRESPASS.

See DAMAGES, 1; RAILROAD, 3, 5.

TRIAL.

See CONTINUANCE; JURISDICTION; NEW TRIAL.

1. *By Jury.—Suits of Equitable Cognizance.*—A counter-claim by a married woman praying the cancellation, as void, of a mortgage sought to be foreclosed, presents an issue of equitable cognizance, and a trial by jury can not be demanded. *Johnson v. Johnson, 112*
2. *Argument to Jury.—Misconduct of Counsel.—Material Error.*—Where, in a cause appealed from a justice of the peace to the circuit court, the plaintiff's counsel, in his closing address to the jury, states that the only object of the defence is to reduce the judgment obtained before the justice enough to throw the costs on the plaintiff, there is such misconduct as will require a reversal, although the language be withdrawn upon objection being made, unless the court promptly and explicitly directs the jury to disregard the improper statement. *Nelson v. Welch, 270*
3. *Same.—Presumption that Improper Statements are Injurious.—Burden of Showing the Contrary.*—Such statements are presumably prejudicial to the adverse party, and the burden is upon the party offending to show that no injury resulted, or that all proper steps were taken to prevent injury. *Ib.*
4. *Argument of Counsel.—Misconduct.—Reversal of Judgment.*—A statement by counsel for the plaintiff, in his closing address, in effect telling the jury that the attorney for the defendant is occupying a position inconsistent with that previously contended for by him on the trial of a similar case, and which is also calculated to remind a juror in the case on trial, who was likewise a juror in the previous case referred to, that his own consistency might be involved in the verdict to be re-

turned in the case under consideration, is such misconduct as will require the reversal of the judgment, unless the offending party shows affirmatively either that the matter was set right by the court or that it was harmless.
Troyer v. State, ex rel., 331

5. *By Jury.—Waiver of.*—The right to a trial by jury is waived by a party who fails to appear to the action at the time of the trial.

Moore v. Glover, 367

6. *Same.—Foreclosure of Mortgage.—Equitable Jurisdiction.*—The foreclosure of a mortgage is a matter of exclusively equitable jurisdiction; and in such proceeding a jury can not be demanded. *Ib.*

7. *By Jury.—Not Allowable When any Essential Part of Cause of Action is of Equitable Cognizance.*—Where any essential part of a cause is exclusively of equitable cognizance, the whole is drawn into equity, and a demand for a jury in an action on a promissory note, and to set aside an alleged fraudulent conveyance, should be refused.

Towns v. Smith, 480

TRUST AND TRUSTEE.

See REAL ESTATE, 1, 2.

1. *Voluntary Trust.—Consideration.—Irrevocability.*—A voluntary trust, resting upon a meritorious consideration, and perfectly created, is irrevocable.
Gaylord v. City of Lafayette, 423
2. *Same.—When Executed.—Definition.*—A trust is executed when it has been perfectly and explicitly declared in a writing duly signed, in which the terms and conditions upon which the legal title to the trust estate has been conveyed or is held, and the final intention of the creator of the trust in respect thereto, appear with such certainty that nothing remains to be done except that the trustee, without further act or appointment from such creator, carry into effect his declared intention; and in such case, though there was no original valuable consideration, the trust will be enforced in favor of one whose relation to the donor was such as to show a good or meritorious consideration. *Ib.*
3. *Same.—When Executory and Incomplete.—Chancery Jurisdiction.*—A trust is incomplete and executory, and not within the jurisdiction of a court of chancery, when property has been conveyed upon a trust, the precise nature of which is imperfectly declared, or when the donor reserves the right to define or appoint the trust estate more particularly, although it may be apparent that the creator of the trust has, in a general way, manifested his ultimate purpose, at a time and in a manner to be determined, either by himself or the trustee, to bestow the property upon a person named. *Ib.*
4. *Same.—Perfect or Imperfect Execution of, Question of Fact.—Rules for Determining.*—Whether a trust is perfectly executed or not is a question of fact, to be determined by the purposes and objects which the settlor had in view, as manifested in the writing and by the situation and relation of the parties and of the trust property; and in cases where the writing is indefinite or the language ambiguous, the practical interpretation given it by the parties themselves, in carrying out their purposes, is entitled to great, if not controlling weight. *Ib.*

TURNPIKE.

See GRAVEL ROAD; NEGLIGENCE, 1 to 3.

VENDOR AND PURCHASER.

See DAMAGES, 2; DEED; FRAUDULENT CONVEYANCE; MORTGAGE, 4; NOTICE, 1; QUIETING TITLE; RAILROAD, 10 to 13, 21; REAL ESTATE.

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VENUE.

See CHANGE OF VENUE.

VERDICT.

See CRIMINAL LAW, 1, 2; NEGLIGENCE, 2.

1. *Evidence.—Supreme Court.—Practice.*—The verdict of a jury, which has met the approval of the trial court, will not be disturbed by the Supreme Court on the evidence, unless the record shows an absolute failure of evidence on some material point. *Spear v. Whitsett, 160*
2. *Special.—Requisites of.—Practice.*—In a special verdict, all facts essential to a recovery must be found, to entitle the party having the burden of the issue to a judgment. Facts only are to be found, and conclusions of law contained therein must be disregarded.
Indiana, etc., R. W. Co. v. Barnhart, 399

WAIVER.

See PRACTICE, 3, 4, 5; SET-OFF, 3; TRIAL, 5.

WARRANT.

See BASTARDY, 2, 3.

WATERCOURSE.

See RAILROAD, 11 to 13.

WIDOW.

See WILL.

WILL.

See EVIDENCE, 1.

1. *Widow.—Devise of a Living from Land.—Charge Upon Land.—Personal Liability of Devisees.—Statute of Limitations.*—A testator gave to his three sons certain real estate, in fee simple. Another clause of the will provided that, after the sons became twenty-one years old, the testator's wife, if she remained a widow, should "be entitled to a living off my said land until she shall marry, and if she shall not marry, then until her death."
- Held*, that the widow's living is made a charge upon the land, but that it is recoverable from the rents and profits and not from the devisees personally.
- Held*, also, that the devisees, by accepting the land, impliedly agreed to account to the widow for such portion of the rents and profits as would amount to her living, if the land yielded so much, regardless of any other means of a living which she might have.
- Held*, also, that the widow is given a life-estate in the land, to the extent of a living at least, upon the condition that she remain unmarried.
- Held*, also, that a subsequent clause of the will authorizing the executors, with the widow's consent, to sell the land during the minority of the sons, for their benefit, did not overthrow her rights as previously fixed; nor did a partition of the land among the sons affect her rights.
- Held*, also, that the devise to the widow was not a conditional one, depending upon all the sons reaching the age of twenty one years. That period merely fixed the time when her right to a living from the land, as against the devisees, should commence; and for such portion of the rents and profits accruing after that time as would be a living, she may recover from the devisees, except in so far as her cause of action is barred by the six years statute of limitations.
Commons v. Commons, 162; Commons v. Commons, 596

2. *Personal Property.—Power of Disposition.—Widow.—Promissory Note.*—A testator gave his personal property to his wife, directing that what should be left undisposed of at her death should descend to his son. The widow loaned money received from her husband's estate and took a note, which she assigned without consideration. She afterwards died. The testator's administrator claims the note as part of the assets of the testator's estate.

Held, that the will at least gave to the widow an absolute power of disposition, which has been effectually exercised, and that the administrator is not entitled to the note. *Tower v. Hartford, 186*

WITNESS.

See CRIMINAL LAW, 4 to 6; EVIDENCE.

WORDS AND PHRASES.

See STATUTE; TAXES, 2; TELEGRAPH COMPANY, 2

WRITS AND PROCESS.

See BASTARDY, 2, 3; SUMMONS.

END OF VOLUME 115.

Dr. C. C. C.

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